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77	7 from end	"(the guardians of the Chertsey Union)"	"(the guardians of the Holborn Union)"
441	to headnote, line 7	add	The act of bankruptcy relied on was committed on January 27th.
467	headnote, line 2	"only"	"alone."
564	line 14 from end	"is"	"est."
588	line 5 from end	"certain to"	"certainly."

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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

XLVIII AND XLIX VICTORIÆ.

[IN THE COURT OF APPEAL.]

1885
May 4.

THE GAS LIGHT AND COKE COMPANY *v.* THE VESTRY OF ST. MARY ABBOTT'S, KENSINGTON.

Gas Pipes—Highway—Repair of Streets—Use of Steam Rollers—Statutable Rights—Injury to Property in the exercise of such Rights.

The plaintiffs, a gas company, laid down pipes under the surface of certain streets, as they were bound by statute to do, for the purpose of supplying gas to light the streets and houses in the streets. The streets were vested in the defendants, the vestry of the parish, by certain statutes which gave them the authority of the surveyor of highways, and with the duty to repair, but without prescribing any particular mode of repair. The defendants used steam-rollers for the repair of the streets, as being a mode of repair most advantageous to both the ratepayers and the public, but the rollers they used were so heavy as to frequently injure the plaintiffs' pipes, though the pipes were sufficiently below the surface as not to have been injured by the ordinary mode of repair if such rollers had not been used:—

Held, that the plaintiffs were entitled not only to recover damages for the injury which had been done, but also to have an injunction to restrain the defendants from using steam rollers in such a way as to injure the pipes of the plaintiffs.

ACTION against the defendants, the vestry of the parish of St. Mary Abbott's, Kensington, for so negligently and improperly

1885

GAS LIGHT AND COKE CO. v. VESTRY OF ST. MARY ABBOTT'S, KENSINGTON.

using steam and other rollers in repairing the streets and highways within such parish as, in numerous cases, to break or otherwise damage the mains, pipes and other works of the plaintiffs under the streets and highways; and the plaintiffs not only claimed damages, but also an injunction to restrain the defendants, their servants, agents, and workmen from using or causing to be used any steam or other roller in such a way as to fracture, damage, or injure the mains, pipes or works of the plaintiffs.

Under the authority of several Acts of Parliament, comprising inter alia the Gas Works Clauses Act, 1847 (9 & 10 Vict. c. 15), and the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), the plaintiffs and their predecessors had lawfully laid down and placed main gas pipes and other works of theirs under the surface of certain roads and streets within, amongst other districts in the metropolis, that of the defendants' parish of St. Mary Abbott's, Kensington, and by ss. 14, 17 and 22 of the Metropolis Gas Act, 1860, the plaintiffs were bound under a penalty to lay pipes and to supply gas to householders as well as to light the streets within the district when required to do so. The roads and streets in question in this case, in which the plaintiffs' pipes and works were so placed, were vested in the defendants as the vestry of such parish by certain statutes, including the Towns Improvement Act, 1847 (10 & 11 Vict. c. 34), the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), and the Metropolitan Local Management Act, 1862 (25 & 26 Vict. c. 102), and under and by virtue of such Acts, the defendants had to execute the office of surveyor of highways, and were bound to maintain and repair the roads and streets in question, but the mode in which they were to repair them was not prescribed. The plaintiffs' pipes were from about twenty to twenty-four inches below the surface of the streets in which they were laid, and this was a sufficient depth to prevent the pipes from being injured by the ordinary traffic along such streets, and also by the ordinary mode of repair, if steam rollers of great weight were not used. About the year 1872, the defendants acquired a fifteen-ton steam roller, and later on a ten-ton steam roller, and they used them for the purpose of repairing the roads, believing that in so doing they were using the most economical and best means of performing the duties

which were vested in them. The consequence of using such heavy rollers was, however, the frequent fracture of the plaintiffs' mains and pipes, and hence the present action, which was tried before Field, J., without a jury in May, 1884, when that learned judge gave verdict and judgment for the plaintiffs for 5*l.* damages, and granted an injunction in the terms prayed for.

The defendants appealed.

Sir F. Herschell, S.G., and *Muir Mackenzie*, for the defendants. The right of the plaintiffs to have their pipes under the streets must be subordinate to the right to use the streets as such, and to the right of the defendants in whom was the soil of the streets to such a depth as was required for the purposes of the street: *Coverdale* v. *Charlton* (1), and *Rolls* v. *Vestry of St. George the Martyr, Southwark.* (2) The defendants were bound to repair, and were entitled to use the best and most approved mode of performing that duty. The injury done to the plaintiffs being the result of the defendants doing what was a lawful act, and what they were entitled to do in performance of a statutable duty, the plaintiffs can have no cause of action for such injury. At all events the injunction is too wide, as it applies to the use of rollers and known modes of repairing roads at the time the plaintiffs' pipes were laid down.

H. Davey, Q.C., and *Webster, Q.C.* (*Stirling* and *Danckwerts*, with them), for the plaintiffs. The gas works and pipes of the plaintiffs were lawfully placed where they were under the surface of the street, and the defendants must therefore be liable for the injury they have done, unless they can shew some statutable authority to entitle them to do what they did. The vestry in repairing the streets and highways in their parish must use their powers reasonably. They need not have steam rollers of such a great weight as ten or fifteen tons, or if they do, they must take care so to use them as not to injure the plaintiffs' property. The rights of the plaintiffs are not subordinate to those of the defendants, any more than the defendants' rights are subordinate to those of the plaintiffs.

[During the argument the following cases were cited: *Powell* v.

(1) 4 Q. B. D. 104. (2) 14 Ch. D. 785.

1885

GAS LIGHT AND COKE CO. v. VESTRY OF ST. MARY ABBOTT'S, KENSINGTON.

Fall (1); *Wallington* v. *Hoskins* (2); *Geddis* v. *Proprietors of Bann Reservoir* (3); *Metropolitan Asylum District Board* v. *Hill* (4); *Fletcher* v. *Rylands* (5); *Wandsworth Board of Works* v. *United Telephone Co.* (6); *Vernon* v. *Vestry of St. James, Westminster* (7); and *Truman* v. *London Brighton and South Coast Railway Co.* (8)]

Cur. adv. vult.

May 4. The judgment of the Court (Lord Coleridge, C.J., Sir J. Hannen, and Lindley, L.J.) was delivered by

LINDLEY, L.J. The plaintiffs in this case seek an injunction to restrain the defendants from using steam rollers so as to injure their pipes, which are laid under the surface of the roads and streets in the defendants' district. Under certain statutes, to which it is not necessary particularly to refer, the roads and streets in question are vested in the defendants, and it is their duty to repair them. No particular method of repairing is prescribed, and subject to the rights of other people it may be taken that it is lawful for the defendants to adopt any mode of repairing which they think proper.

It appears that since 1872 heavy steam rollers have been used for this purpose, and it is said, we will assume correctly, that their use is advantageous and beneficial both to the ratepayers who have to pay for repairing the streets, and to the public who use them; beneficial to the ratepayers in point of expense, and beneficial to the public because the metalling of the roads is better and more quickly consolidated by steam rollers than by any other known means.

Under certain other statutes to which it is not necessary particularly to refer, the plaintiffs, or their predecessors, have both before and since 1872, lawfully laid down gas pipes under the surface of the defendants' roads and streets, and the plaintiffs are entitled to have those pipes there for the purpose of supplying gas to such persons as may desire to be so supplied, and it is

(1) 5 Q. B. D. 597.
(2) 6 Q. B. D. 206.
(3) 3 App. Cas. 430.
(4) 6 App. Cas. 193.
(5) Law Rep. 1 Ex. 265; 3 H. L. 330.
(6) 13 Q. B. D. 904.
(7) 16 Ch. D. 449.
(8) 25 Ch. D. 423.

material to bear in mind that although the profits, not exceeding a certain amount derived by the plaintiffs from the manufacture and supply of gas, are divisible amongst the shareholders of the plaintiff company, yet the plaintiffs are bound to supply gas to persons who live in the streets along which their pipes are placed. Speaking generally the plaintiffs' pipes are laid from twenty to twenty-four inches below the surface of the streets along which they are laid, and this depth is found sufficient to enable them to sustain without injury the ordinary traffic, light and heavy, along the streets. The same depth is also sufficient to enable the pipes to remain uninjured by the ordinary modes of repair, if heavy steam rollers are not used. It appears, however, that the steam rollers used by the defendants are so heavy as frequently to injure the pipes of the plaintiffs over which the rollers pass, and this circumstance has given rise to the controversy which we have now to consider.

It is obvious from the foregoing statement that the rights of the plaintiffs and of the defendants are to a certain extent conflicting. On the one hand, it is plain that the plaintiffs' right to lay their pipes and have them uninjured is subordinate to the right of the public to use the streets and to have them kept in repair; on the other hand, it is equally plain that the duty of the defendants to the public and their right as against the plaintiffs is to repair the streets and keep them fit for traffic. Now there is no dispute that the defendants can perform their duty without using steam rollers of such a weight as to injure the plaintiffs' pipes, but they say it is their duty and right to repair the roads in the most economical and best way, and to avail themselves of all improvements regardless of the effect on the plaintiffs' pipes. Field, J., has held that this contention cannot be supported, and we are of opinion that his decision is correct.

The authorities to which he referred, and particularly the *Metropolitan Asylum District Board* v. *Hill* (1), shew that an action lies for an injury to property, unless such injury is expressly authorized by statute, or is physically speaking the necessary consequence of what is so authorized. If in this case the defendants were expressly authorized by statute to use steam rollers

(1) 6 App. Cas. 193.

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of such a weight as necessarily to injure the plaintiffs' pipes, the plaintiffs would have no ground of complaint. The case would then be one of damnum absque injuria. The same consequence would follow if the defendants were expressly authorized by statute to repair in some way which necessarily required the use of heavy steam rollers, or other machinery which could not be worked without injuring the plaintiffs' pipes; there again, although such rollers or machinery were not expressly mentioned, their use would be authorized by necessary implication, and the plaintiffs would be without redress. But unless some such statutory enactment can be shewn to authorize the defendants to injure the plaintiffs' pipes the plaintiffs are entitled to redress.

In this case there is no such statute, and it is not necessary to say more. But the conclusion thus arrived at on general principles only is in our opinion very much strengthened by those statutory enactments which empower the defendants to require the position of the plaintiffs' pipes to be altered for the public benefit, but which also compel the defendants to pay the expenses of such alterations. We refer particularly to 10 & 11 Vict. c. 34, s. 61; 18 & 19 Vict. c. 120, s. 98; and 25 & 26 Vict. c. 102, s. 73, which incorporates s. 52 of 57 Geo. 3, cap. xxix. (local and personal).

We pass now to consider the question whether the plaintiffs are entitled to an injunction, or only to damages, and if to an injunction in what form it should be.

The particular instances in which injury to the plaintiffs' pipes by the use of the steam rollers was clearly proved were reduced to one; but we are satisfied by the evidence that there is very considerable danger of frequent injury, and considering that the defendants claim the right to inflict it, or in other words claim the right to use steam rollers of any weight, regardless of the consequences to the plaintiffs, we are of opinion that the plaintiffs are entitled to an injunction.

As regards the form of the injunction, we are also of opinion that it is substantially unobjectionable; but we think it ought to be confined to steam rollers, there being no proof of injury by any other rollers, and no proof of any intention to use any rollers, except steam rollers, which are likely to do any harm.

We also think that the words "properly laid," ought to be added, if the defendants wish it after the words "mains, pipes, or works of the plaintiffs." But these variations ought not, in our opinion, to affect the costs of the appeal, which ought to be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs: *Bedford & Williams.*

Solicitors for defendants: *Pontifex, Hewitt, & Pitt.*

W. P.

THE LONDON AND YORKSHIRE BANK, LIMITED *v.* COOPER AND OTHERS.

May 20.

Practice—Production of Documents—Documents held in Right of another, Production of, when ordered.

In an action on a promissory note, made by the defendant as security for the repayment of moneys due to the plaintiff from a limited company, the defendant objected to produce documents relating to the matters in question in the action, being the banker's pass-book and directors' minute-book of the company, on the ground that they were in his custody only as liquidator in the voluntary winding-up of the company. The company had been dissolved before the application for discovery of documents was made:—

Held, that the plaintiff was entitled to inspection of the documents, as there was no interest which could be affected by their production other than the interest of the parties to the action.

Murray v. *Walter* (Cr. & P. 114), *Kearsley* v. *Phillips* (10 Q. B. D. 465), and *Vivian* v. *Little* (11 Q. B. D. 370) distinguished.

APPEAL from a decision in chambers of Pollock, B.

The action was brought to recover the amount due on a promissory note, alleged to have been made by the defendants as security for the repayment of sums of money due, or which might become due, to the plaintiffs from the Liverpool Property Company, Limited.

The plaintiffs having obtained an order for discovery of documents, one of the defendants, Wing, in his affidavit in reply stated, with respect to certain documents, including the banker's pass-book and a director's minute-book of the Liverpool Property Company, Limited, as follows:—

"I have in my custody, but not otherwise than as hereinafter mentioned in my possession or power, the documents relating to

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the matters in question in this action, set forth in the 3rd schedule hereto. I have not, and I never had, any property in the said documents myself. I originally had the custody of the said documents merely as the secretary and on behalf of the Liverpool Property Company, Limited (the plaintiffs' principal debtors in the pleadings in this action mentioned); and I now have the custody of the said documents merely as the liquidator appointed in the winding-up of the said Liverpool Property Company, Limited, under the provisions of the Companies Acts, 1862 to 1883.

"I object to any order being made upon me for the production of the documents in the 3rd schedule mentioned on the ground that my custody thereof, as hereinbefore mentioned, is not such a possession as imposes upon me a liability to produce the same to the plaintiffs under an order for discovery in this action."

It was conceded that the Liverpool Property Company had been wound up voluntarily, and that the company had been dissolved before this action was commenced.

Pollock, B., refused to order inspection of the documents in question.

May 12. *E. Bray*, for the plaintiffs. The defendant, Wing, as liquidator of the company, is an officer of the court, which can, therefore, make him produce these documents. The ordinary rule as to production of documents held in another right should be relaxed. The winding-up being now over, and the company having dissolved, there is no other interest to be affected by production.

Forbes, Q.C. (*C. Gould*, with him), for the defendants. Wing still holds the documents only as trustee for the company, which might be revived for some purposes by special application under the Companies Acts.

[LORD COLERIDGE, C.J. I have no desire to infringe the doctrine of *Murray* v. *Walter* (1) and *Vivian* v. *Little* (2), which decisions appear to me founded on excellent sense. The principle of them is that production of documents should not be

(1) Cr. & P. 114. (2) 11 Q. B. D. 370.

required where the interests of persons not parties to the action might be affected. But here the company has gone; no shred of interest remains. Why should not the Court under those circumstances order inspection of the documents when good sense would obviously seem to demand it?]

The true principle is that inspection should only be allowed where a party to an action holds documents in his own individual interest, and in no other interest.

Cur. adv. vult.

May 20. FIELD, J. This was an action founded upon a personal obligation of the defendant, and he was called upon in the ordinary course to make discovery of documents in his possession or power relating to the matters in question in the action. In his affidavit in answer he stated that he had in his possession certain documents—the important ones being a banker's pass-book and a minute-book—and that he was not bound to produce them because they were in his custody or possession, not in his own right as an individual, but in another right as liquidator of a company which had been voluntarily wound up. Upon what is stated in that affidavit I consider that the defendant primâ facie would be protected, but it was frankly admitted by his counsel that, although the defendant was at one time the liquidator of the company, and the documents came into his custody as such liquidator, yet his duty as a liquidator was entirely at an end, because the liquidation had come to an end, and the company had been dissolved. When the matter was argued I doubted whether a case for discovery had been made out. My Lord had then made up his mind that under the circumstances stated in the affidavit there was nothing to prevent this Court from doing that which he said was obviously good sense—namely, ordering production of the documents. Having had the opportunity of looking at the authorities I am now glad to be able to agree with that view. I think there is no authority to the contrary. The documents in question are undoubtedly in the defendant's possession; he has a property in them, and power to deal with them in any way he pleases. The cases, therefore, upon which he relied, and upon the authority of which he sought to protect himself against

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production, do not apply. In *Kearsley* v. *Phillips* (1), which followed *Murray* v. *Walter* (2), the Court refused to order inspection of documents which were in the defendant's possession as joint trustee with another person, not a party to the action, and were the muniments of their title, as mortgagees, to certain premises. In *Vivian* v. *Little* (3) the Court held that the committee of a lunatic was not bound to produce the title deeds of the lunatic's estate, because they were not in the committee's custody, but in the custody and control of the Court having jurisdiction in lunacy. The committee's possession seems there to have been treated as the possession of the Court. There would have been great difficulty here in going beyond the doctrine laid down in these cases had not the defendant's counsel admitted that the company was at an end. No shareholder or other person had the smallest interest in the matter. It seems to me, therefore, clear that under the circumstances the doctrine does not apply; that the plaintiffs ought to have inspection of the documents, and that the appeal should be allowed with costs.

LORD COLERIDGE, C.J. I sufficiently expressed my opinion upon this question when the case was argued. I am glad that my Brother Field is now able to concur.

Appeal allowed.

Solicitors for plaintiffs: *Deacon, Son, & Gibson, for Vickers, Sons, & Brown, Sheffield.*

Solicitors for defendants: *J. & R. Gole, for Pashley & Hodgkinson, Rotherham.*

(1) 10 Q. B. D. 465. (2) Cr. & P. 114.
(3) 11 Q. B. D. 370.

W. A.

[IN THE COURT OF APPEAL.]

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Nov. 10.

UZIELLI & CO. *v.* THE BOSTON MARINE INSURANCE COMPANY.

Insurance (Marine)—Re-insurance—Constructive Total Loss—Notice of Abandonment—Suing and Labouring Clause.

Upon a constructive total loss happening to the ship insured, notice of abandonment need not be given to the underwriters of a policy of re-insurance.

The owners of a ship insured her for twelve months in an ordinary Lloyd's policy, which contained a suing and labouring clause. The underwriters of the Lloyd's policy re-insured themselves with a French company which re-insured itself with the defendants. The policy underwritten for the French company by the defendants was for 1000*l.*, bound them to pay as might be paid on the original policy, was to cover the risk of total loss only, and contained a suing and labouring clause. Whilst the policy was in force, the ship went ashore and was much damaged. Her owners gave notice of abandonment to the underwriters of the Lloyd's policy, but notice of abandonment was not given to the defendants: the underwriters of the ship ultimately settled with her owners at 88 per cent. They expended more than 5000*l.* in floating the ship, and sold her to a builder, who repaired her at a cost of 9000*l.*, and resold her for 11,200*l.* The cost of floating the ship (after deducting the price paid by the shipbuilders) being added to the 88 per cent. represented a loss of 112 per cent. In an action by the French company as re-insurers against the defendants:—

Held, that a constructive total loss had occurred, and that as the defendants had bound themselves to pay as might be paid on the original policy, they were liable to the extent of 1000*l.*; but that they could not be held liable for more, as the underwriters of the Lloyd's policy were not the "factors, servants, or assigns" of the plaintiffs within the meaning of the suing and labouring clause, and that the defendants were not liable, at least by virtue of that clause, for any part of the expenses incurred in floating the ship.

ACTION upon a marine policy of re-insurance.

At the trial before Mathew, J., during Hilary Sittings, 1884, the following facts were proved or admitted:—

The plaintiffs were the agents of a French insurance company, called the Compagnie l'Armement of Paris, and the defendants were a marine insurance company carrying on business in London. In February, 1881, a ship called the *Rose Middleton* was insured upon several policies for a total amount of 12,500*l.* Some of these policies had been effected with insurance clubs, but one of them was a Lloyd's policy for 1500*l.* for the period of twelve months from the 20th day of February, 1881. It contained the usual clause as to perils of the seas, and also the usual sue and

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labour clause, namely, that "in case of any loss or misfortune it shall be lawful for the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods, and merchandizes, and ship, &c., or any part thereof, without prejudice to this insurance, to the charges whereof we the assurers will contribute each one according to the rate and quantity of his sum herein assured." The underwriters on the policy at Lloyd's for 1500*l.* reinsured themselves for that amount with the French insurance company. In October, 1881, the plaintiffs on behalf of the French insurance company effected with the defendants a policy of marine insurance for 345,073*l.*, and were insurers to the plaintiffs for that amount on the hulls and machinery of 443 steamers, as per lists on the policy, at and from the 1st day of October, 1881, to the 31st day of March, 1882. The perils insured against by the policy were those ordinarily covered by a policy of marine insurance, and included perils of the seas and all other perils, losses, and misfortunes, that had or should come to the hurt, detriment, or damage of the aforesaid subject matter of insurance or any part thereof, and the policy was therein declared to be a reinsurance applying to policy or policies issued by the Compagnie l'Armement of Paris, subject to the same terms, clauses, and conditions, as the original policy or policies, and to pay as might be paid thereon, but to cover the risk of total loss only, and the policy contained an ordinary suing and labouring clause. One of the steamers specified in the lists on the policy of reinsurance was the steamer *Rose Middleton*, and the sum for which she was insured by the policy was 1000*l.*

In October, 1881, the *Rose Middleton* went ashore a few miles from Leith, and was in a position of extreme danger: the ground was rocky, and the ship's bottom was much damaged. Notice of abandonment was given to the underwriters of the ship, and thereupon they took measures for getting the ship off, and after working for three months, and spending 5812*l.*, the ship was got into the port of Leith. After some negotiations a compromise was arrived at, the underwriters (both at Lloyd's and the insurance clubs,) paying 88 per cent., or 11,000*l.*, and they sold the ship for their own benefit for 2550*l.* The French company thereby

became liable under their policy to pay to the assured, namely, the underwriters at Lloyd's, their proportion of the 88 per cent., and a proportion of the expenses (5812*l.*) incurred in getting the ship off, less the proceeds of the sale, and these sums altogether amounted to a loss of 112 per cent. The buyer of the ship was W. B. Thompson, a ship-builder of Dundee, who repaired her. The total cost of labour, materials, and wages expended in repairing her was 7541*l.* or thereabouts, to which ought to be added 25 per cent. for the ordinary builders' profit. The cost of repairing her, therefore, to her owners, if she had not been sold, would have been about 9000*l.* If to this be added the sum of 5812*l.*, spent in bringing her into the port of Leith, she would have cost her owners about 14,812*l.* before she could be rendered seaworthy. Thompson sold the *Rose Middleton* for 11,200*l.* after she had been repaired; that was then her full value.

No notice of abandonment was ever given to the defendants in the present action.

Mathew, J. was of opinion that there had been a constructive total loss of the *Rose Middleton*, that the underwriters had expended more than 100 per cent. in their efforts to save her, but that the expenditure had been judiciously made. The learned judge, therefore, gave judgment for the plaintiffs for 1120*l.*

The defendants appealed.

Oct. 30, 31. *Finlay, Q.C.* (*J. Edge*, with him), for the defendants. The judgment of Mathew, J., is wrong. The judgment was for the plaintiffs for 1120*l.*, and it is wrong on three grounds; first, there was no constructive total loss of the vessel, and as the policy with the defendants was to cover the risk of total loss only, the plaintiffs cannot recover at all unless there was total loss; secondly, no notice of abandonment was given to the defendants; and thirdly, no expenses are recoverable against the defendants under the "sue and labour" clause, the policy sued on being a reinsurance to which such a clause is not applicable. As to the first ground, there was no constructive total loss, for, by the compromise, only 88 per cent. on the value was paid, and the underwriters took the ship. The parties elected not to treat the loss as a constructive total loss.

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[BRETT, M.R. They obviously treated it as a total loss.]

Next, there was no notice of abandonment. It is said that such is not necessary in the case of a reinsurance, but that is not so. It is true that there is little authority on this subject. In Phillips on Insurance, s. 1506, it is said that "it has been held that there is no necessity of abandonment in a reinsurance. The reassured could not abandon without accepting the abandonment of the assured, since he otherwise has nothing to abandon, and Mr. Justice Livingston says, giving the opinion of the Court, 'it would be to the disadvantage of the reassurer to compel his assured in all cases to accept of an abandonment, which would be necessary if he himself be entitled to one.'" But, in 1 Arnould on Marine Insurance, 4th ed. p. 95, the reinsurer, it is said, "is not bound by the first insurer's acceptance of an abandonment, and seems in that case entitled within a reasonable time after such acceptance to notice of abandonment. Even in the case of non-acceptance by the first insurer it seems advisable to inform the reinsurer forthwith of the notice received and refused, in order that he may take such measures for his own protection, as shall appear proper." Why should not notice of abandonment have been given when the compromise was made, so that the defendants might have had any benefit of salvage?

[BRETT, M.R. There was nothing to abandon. A loss cannot be abandoned.

LINDLEY, L.J. There was no salvage.]

Lastly, the defendants' liability is limited to a total loss. They cannot be liable for the expenses of getting the vessel off. The sue and labour clause does not apply here: *Aitchison* v. *Lohre*. (1) The clause is inserted only to recover expenditure incurred in order to avert a loss: 2 Arnould on Marine Insurance, 4th ed., pp. 723, 724, where reference is made to the judgment of Willes, J., in *Kidston* v. *Empire Insurance Co.* (2), who (at page 543) says its meaning is that "if an occasion should occur in which, by reason of a peril insured against, unusual labour and expense are rendered necessary to prevent a loss for which the underwriters would be answerable, and such labour and expense is incurred accordingly, the underwriters will contribute, not as

(1) 4 App. Cas. 755. (2) Law Rep. 1 C. P. 535.

part of the sum insured in case of loss or damage, because it may be that a loss or damage for which they would be liable is averted by the labour bestowed, but as a contribution on their part as persons who have avoided detriment by the result, in proportion to what they would have had to pay if such detriment had come to a head for want of timely care." The clause applies only to labour and expense incurred by the plaintiffs, for whom the defendants assured, and not to what may have been incurred by those for whom the plaintiffs were insurers; they are not the agents or servants of the defendants, the re-insurers.

Cohen, Q.C., and *G. Barnes*, for the plaintiffs.

[BRETT, M.R. We only require the plaintiffs' counsel to answer the last point.]

To recover what was given beyond the 100*l.* per cent., it is not necessary for the plaintiffs to rely only on the sue and labour clause. The defendants by this policy of reinsurance undertook to pay all that the plaintiffs would have to pay under the policy by which they insured the vessel, and therefore they are liable for what the plaintiffs were liable under the sue and labour clause in that policy.

But a reinsurer may be liable under the suing and labouring clause; and in the present case the word "servants" will include "agents," and the underwriters who succeeded in floating the *Rose Middleton* were "servants" of the French company within the meaning of the clause; the plaintiffs, therefore, are entitled to recover for the salvage expenses: *Dixon* v. *Whitworth* (1); which, it is submitted, is not impeached for the purposes of this case by *Aitchison* v. *Lohre*. (2) It would be mischievous to hold that a reinsurer is not liable for expenses incurred in endeavouring to avert a total loss, for it would be to the interest of the re-assured to do nothing to avert it, he not being indemnified by the reinsurer, who ought ultimately to bear the loss. If the argument for the plaintiffs is incorrect as to this point, it seems at least questionable whether in a policy of reinsurance any meaning can be given to the suing and labouring clause. A policy of reinsurance ought as to all its clauses to be construed as

(1) 4 C. P. D. 371. But see *Dixon* v. *Sea Insurance Co.*, W. N. 1880, p. 43.
(2) 4 App. Cas. 755.

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far as is possible like an ordinary policy: *Mackenzie* v. *Whitworth*. (1)

Finlay, Q.C., in reply.

Cur. adv. vult.

Nov. 10. The following judgments were delivered:—

BRETT, M.R. This is an action brought upon a policy of marine insurance against a total loss. Mathew, J., has given judgment for the plaintiffs for 1120*l*. The policy was one of reinsurance, and had been effected by those who themselves were reinsurers, and it was accepted by the defendants for the sum of 1000*l*.; but the judgment of Mathew, J., has given to the plaintiffs more than 1000*l*. The defendants have appealed from this judgment, and several contentions have been raised on their behalf, which in substance are as follows: first, the policy was against a total loss only, and the damage to the ship amounted merely to a partial loss; and on this ground it has been argued that the defendants are entitled to judgment in the action; secondly, no notice of abandonment was given to the defendants, and this was necessary because if there was a total loss it was only constructive; thirdly, the plaintiffs were entitled at most only to 88 per cent. of the sum for which the defendants were liable on the policy; fourthly, the plaintiffs cannot recover under the suing and labouring clause. As to the first point, whether there was a constructive total loss, it is perfectly obvious that there was. I need say no more on this point. As to the second contention of the defendants, that no notice of abandonment was given, it appears that notice of abandonment was given to the first insurers, and that according to insurance law was sufficient. The answers to the third and fourth contentions of the defendants depend upon the question, what in this case is the subject-matter of insurance. It is a reinsurance policy effected by reinsurers; but after all it is a policy on the ship. What was the interest of the real plaintiffs, the reinsurers, in the ship? They were not owners, and therefore they had none as owners. But they have an insurable interest of some kind, and that insurable interest is the loss which they might or would suffer under the policy, upon

(1) Law Rep. 10 Ex. 142; on appeal 1 Ex. D. 36.

which they themselves were liable. What does this loss amount to? It might be more than the real plaintiffs' share in the full value of the ship, because of the sue and labour clause: they might have to pay more than their share in the full value of the ship under the suing and labouring clause: their liability might include not only their share in the full value of the ship, but what might be charged to them under the suing and labouring clause. Therefore, if the reinsurers insured the ship to the full amount of her value and more, I should say that it would not be a case of over-insurance, and that is because of the operation of the suing and labouring clause. That is the nature of the plaintiffs' interest. Therefore the real plaintiffs might have insured for more than their share in the full value of the ship; but they have insured only to the extent of 1000*l.*; and they cannot recover on the policy more than they have insured for: all that they can recover is 1000*l.* It is simply a policy on the ship to the extent of 1000*l.* But then the question arises, can the plaintiffs recover more than 1000*l.* by reason of the suing and labouring clause in this policy? The difficulty is, what is the true construction of that clause in this policy? That is the question which has made us hesitate. I myself should be inclined to give to that clause all the width that I could: I should be inclined to hold that it gave the assured in this policy power to sue and labour for the benefit of the adventure; I think that the assured would have sufficient interest in the ship to entitle them so to do. But in this case the suing and labouring for the safeguard and preservation of the ship was not by the assured under this policy, but by other underwriters. Those other underwriters were not either the "factors," the "servants," or the "assigns" of the re-assured. If the word "agents" had been inserted, I should have hesitated more; but the clause is drawn in the common form, and it does not cover such a case as this where there is a policy of reinsurance upon a reinsurance. I have come to the conclusion that the assured upon the policy sued on cannot recover more than 1000*l.* The judgment must be varied so as to include the sum of 1000*l.* and no more. The appeal must be dismissed.

COTTON, L.J. I agree with the conclusion at which the Master

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of the Rolls has arrived. It is a policy of reinsurance for 1000*l.* Two arguments have been principally urged: first, that the defendants are not liable to any amount; and, secondly, if they are, they are not liable for any sum beyond 88 per cent. of the sum insured. As to the first point, it is clear that there was a total loss. Then it is urged that no notice of abandonment was given to the defendants, but it was properly given to the first insurers, and it is wrong to say that in every case where notice of abandonment has been given the insurers are liable: hence it was unnecessary and unadvisable to transmit the notice of abandonment to the reinsurers. As to the second point, I agree that the policy is a contract of insurance upon the ship: it is a reinsurance upon the policy issued by the French company to pay as they shall pay, but to cover a total loss only. The insurance is effected by those who are not owners, but by those who are liable in respect of the ship. What is the extent of the defendants' liability? The original insurers are liable in respect of the loss of the ship; but the defendants' liability on the policy is limited to the extent of 1000*l.*, and that is all which they can be properly called upon to pay on the policy. They are liable to this extent by reason of the total loss which has occurred. The suing and labouring clause has been sufficiently dealt with by the Master of the Rolls. I do not think that the underwriters who floated the ship were the factors, servants, or assigns of the reinsurers. I agree with the Master of the Rolls as to his view of the effect of the suing and labouring clause. We can only hold the defendants liable for the sum of 1000*l.* and no more; the defendants have succeeded upon this appeal to a slight extent, but on the whole they have failed.

LINDLEY, L.J. I am of the same opinion. As to the first point, it is clear that there was a total loss. The second point is whether notice of abandonment was necessary, and it seems to be settled law in the case of a policy of reinsurance that if a constructive total loss has happened no notice of abandonment is necessary. The point has not perhaps been decided in this country, but it appears to have been considered in America that no notice of abandonment is necessary; at least it has been so

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Lindley, L.J.

laid down in Phillips on Marine Insurance, s. 1506, where the words of Livingstone, J., in giving the opinion of the Court in *Hastie* v. *De Peyster* (1) are cited. It seems plain upon principle that no notice of abandonment is necessary in the case of a reinsurance.

It is plain, therefore, that the plaintiffs are entitled to recover something upon this policy. They seek to recover 88 per cent., which the French company have paid for a total loss, and they seek to recover more under the suing and labouring clause in the policy. Now in the policy sued on, the ship as between the plaintiffs and the defendants is insured at 1000*l.*, the policy itself is declared to be a reinsurance, and also it contains the suing and labouring clause. We have to construe the rights of the parties by the assistance of the clauses relating to these three matters. If it were not for the clause whereby the defendants were rendered subject to the same terms, clauses, and conditions as were contained in the original policy, and were to pay as might be paid thereon, the plaintiffs, in my opinion, if indeed they could recover at all, would be entitled to recover only 88 per cent.; it seems to me that they could not recover under the suing and labouring clause. I do not think that even if the word "factors" could be held to include "agents," the clause would bear the construction contended for. The plaintiffs, however, rely upon the special clause, whereby the defendants have undertaken to pay as the French company shall have paid, and under this clause they are entitled to recover any sum not exceeding 1000*l.* The appeal strikes off 12 per cent.; but it has substantially failed, and ought to be dismissed with costs. The judgment of this Court is that the plaintiffs are entitled to recover 1000*l.* and no more.

Appeal dismissed; but amount of judgment to be reduced to 1000*l.*

Solicitors for plaintiffs: *Waltons, Bubb, & Walton.*
Solicitors for defendants: *Lowless & Co.*

(1) 3 Caines, N. Y. 190.

J. E. H.

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Dec. 8.

[IN THE COURT OF APPEAL.]

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF OVER DARWEN *v.* THE JUSTICES OF THE PEACE FOR THE COUNTY PALATINE OF LANCASTER.

Highway — Highway in Borough — Expenses of Maintenance — Contribution from County Authority — Highway Act, 1862 (25 & 26 *Vict. c.* 61), *s.* 2 — *Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *ss.* 13, 38.

By the Highway Act, 1862 (25 & 26 Vict. c. 61), s. 2, defining the word "county," "for the purposes of this Act all liberties and franchises except boroughs . . . . shall be considered as forming part of that county by which they are surrounded."

By the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 38, "in this Act 'county' has the same meaning as it has in the Highway Acts, 1862 and 1864," and by s. 13 any road which has between the 31st of December, 1870, and the date of the Act ceased to be a turnpike road . . . . shall be deemed to be a main road, and one half of the expenses incurred in the maintenance shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area "by the county authority of the county in which such road is situate" out of the county rate.

A road in the borough and highway area of Over Darwen, in Lancashire, ceased to be a turnpike road in 1877 :—

Held, that, although for the purposes of the Highway Act, 1862, boroughs are not to be considered as forming parts of counties, yet as the road was within the geographical limits of Lancashire, the county of Lancaster was the "county in which such road is situate" within 41 & 42 Vict. c. 77, s. 13, and the county authority was liable to pay half the expenses incurred in the maintenance of such road.

Judgment of the Queen's Bench Division (13 Q. B. D. 497) affirmed.

APPEAL by the defendants from the judgment of the Queen's Bench Division upon a special case in favour of the plaintiffs.

The facts are fully set forth in the report of the proceedings before the Queen's Bench Division (1), and it is here only necessary to give the following short statement of them.

The plaintiffs were the highway authority of the borough of Over Darwen, and the borough was a highway area within the meaning of the Highways and Locomotives (Amendment) Act, 1878; the defendants were the county authority as defined by

(1) 13 Q. B. D. 497.

the same statute. The town of Over Darwen was incorporated in March, 1878; it had no separate court of quarter sessions. The Bolton and Blackburn turnpike road was constructed by turnpike trustees under an Act passed in the eleventh year of King George IV., which was renewed by another Act passed in 1862; but in 1877 it ceased to be a turnpike road. The Bolton and Blackburn road passed through the borough of Over Darwen. The plaintiffs, as the highway authority, had, under s. 13 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 13, demanded from the defendants payment of one half of the expenses incurred by them for the year ending the 25th of March, 1883, in the maintenance of so much of the Bolton and Blackburn road as was within the borough. The defendants refused to pay the sum demanded of them or any part thereof.

The question for the opinion of the Court was whether the county authority was liable, by virtue of the Highways and Locomotives (Amendment) Act, 1878, or otherwise, to pay out of the county rate the sum above demanded or any part thereof.

Gorst, Q.C. (*H. F. Blair,* with him), for the defendants. The question in this case depends upon the meaning of the phrase, "the county in which such road is situate," which occurs in s. 13 of the Highways and Locomotives (Amendment) Act, 1878. By the interpretation clause (s. 2) of the Highway Act, 1835, the word "county" is not to include boroughs; therefore the part of the turnpike road, which passes through the borough of Over Darwen, is outside of the county. It must be admitted that if the word "county" occurring in s. 13 is to be read in its ordinary sense, the county rate will be liable to contribute towards the repair of the road within the borough; but if this construction prevails, the statute will impose a much greater burden upon counties than they were ever exposed to before.

R. Henn Collins, Q. C., and *W. H. Cross,* were not called upon to argue for the plaintiffs.

BRETT, M.R. In all that the defendants' counsel has urged, he has applied the definition in s. 2 of the Highway Act, 1862, to the phrase in s. 13 of the Highways and Locomotives (Amend-

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ment) Act, 1878. He no doubt has raised many points, and has made an argument which it is difficult in all its parts to answer. Nevertheless I think that I can give my judgment on a very simple ground. Sect. 2 of the earlier Act is dealing with the definition of the word "county;" but the question is, to my mind, whether that definition is applicable, not to the word "county," but to the phrase, "the county in which such road is situate," which occurs in s. 13 of the later Act. To my mind it does not apply to that. It seems to me that the definition in s. 2 of the earlier Act does not apply to that phrase, which must be left to bear its ordinary meaning. If that is the true construction, it is admitted that within the ordinary meaning of the phrase this road and this highway area are all in "the county in which such road is situate." The road is situate in the county. Upon that ground alone I think that the judgment must be supported. What is the meaning of these statutes? These Acts are dealing with two things. They are dealing with geography, and also they are dealing with jurisdiction. They are dealing with the power of justices to make certain orders—that is a matter of jurisdiction—and they are dealing with things which they describe, and the things with which they are dealing and which they describe are geographical, as it has been well put. What is the geography of England as described upon the maps, which are recognised and accepted as correct? England is divided geographically into counties, at least to this extent, that there is no part of England which is not within a county. The names of the larger counties are perfectly well known: and then there are some other counties which are counties of cities, or counties of towns. They may be well called counties, and so they are. They are treated as separate counties almost for all purposes. Then the moment the physical thing is mentioned, which is a road, and which is pictured on every map which describes physical things upon the surface of England, that road is found by the map to be situated in a particular county. Where is that road situated upon a map which divides England into counties? So far as that map is concerned, its situation is within the county within which it is pictured on the map; and therefore, when I come to the phrase, "in which such road is situate," it seems to me that the legislature is

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speaking of the map, and that it is speaking of a physical thing pictured on the map; and when it speaks of that physical thing pictured on the map, and says that it is situated within a county, the legislature means that, as pictured upon that map, the road is situated in the county which is also pictured on that map; so that I think that this phrase is not to be frittered away or disturbed by what is the definition of a county for the purpose of the exercise of jurisdiction, and that that phrase, as a descriptive phrase in a matter of geography, is not therefore tampered with, or altered, by the definitions in the earlier Act. In s. 13 of the Highways and Locomotives (Amendment) Act, 1878, the word "county" is used according to its ordinary meaning, and then, by the admission of the defendants' counsel, by its ordinary meaning this road is included in a county. I therefore give judgment against the appeal.

COTTON, L.J. The section which we have to deal with, is the 13th section of the Highways and Locomotives Amendment Act, 1878, 41 & 42 Vict. c. 77, which is plain in itself. The real question is, how it is to be dealt with, having regard to the interpretation clause. The only question in s. 13 is whether this main road is situated in the county of Lancaster, and it clearly is but for this difficulty, that in s. 38, the interpretation clause, it is said that "county" shall have the same meaning as in the previous Acts. It will be better to read the actual words: it is the last section, numbered 38:—"County has the same meaning as it has in the Highway Acts, 1862 and 1864, except that every liberty not being assessable to the county rate of the county or counties within which it is locally situate shall, for the purposes of this Act, other than those relating to the formation and alteration of highway districts, and the transfer of the powers of a highway board, be deemed to be a separate county." Now the draftsman was a little bit cautious, because he put in this phrase, "within which it is locally situate." That shews that it is referring there to a franchise situated geographically in a county. Then the difficulty under the Act of 1862 is that by the interpretation clause, s. 2, a county shall not include a "county of a city," or a "county of a town," but where the

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county shall, as before defined, be divided into ridings, each riding shall be a separate county, and "for the purposes of this Act all liberties and franchises, except the liberty of St. Albans, which shall be considered a county, and except boroughs as hereinafter defined, shall be considered as forming part of that county by which they are surrounded." And it is said that the borough which we are dealing with, being one coming within the definition afterwards contained in the statute, is excluded altogether and for all purposes, when the word "county" is used in the Act which we are discussing, and in the 13th section. Now, in my opinion, that is erroneous: these interpretation clauses are not to impose upon us the necessity of giving interpretations, which are inconsistent with the context and inconsistent with what is the clear meaning of the clause upon which the question arises; and where I can see that a clause has reference to the county in which the road is physically or geographically situated, then I do not apply to such a section the definition which is contained in the 2nd section of the Highway Act of 1862. The meaning of the interpretation clause in the Highway Act, 1862, is, that certain powers are given by the Highway Acts to the county authorities to be exercised within their own county. They shall not exercise these powers so as to interfere with the local authorities in places which have a duly constituted local authority, but for the purpose of the powers given by this Act a borough, as thereinafter defined, shall not be a place where they may exercise the powers given to them within the county. In my opinion this section in which the word "county" occurs, is clearly referring to a geographical division, and not to any jurisdiction to be exercised. Then it is said that because a road is in a borough, it is not, within the construction of the section, to be deemed to be situated within the county. In my opinion this road is geographically and physically within the county of Lancaster, and therefore the decision of the Court below is right.

LINDLEY, L.J. I am of the same opinion. It appears to me, I confess, that the meaning of s. 13 is perfectly plain; but, we are asked not to construe it in that apparent plain sense, but

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to put upon it another sense which is to be got at by working out a very difficult puzzle. Now, if the result of puzzling the matter out was that I could see my way plainly, that word "county" occurring in s. 13 was not intended to bear its ordinary meaning, I should act accordingly. But I cannot make out anything of the sort; on the contrary, it appears to me that the plain construction of s. 13 must remain, because what we have to get at is, whether this main road is situated in the county of Lancaster. It appears to me that the result is apparent, in whatever manner the question is viewed. I think that the decision of the Queen's Bench Division is perfectly right. This appeal must be dismissed with costs.

Judgment affirmed.

Solicitors for plaintiffs: *Pritchard, Englefield & Co.*

Solicitors for defendants: *Ridsdale & Son, for Wilson & Hulton, Preston.*

J. E. H.

[IN THE COURT OF APPEAL.]

Dec. 12.

THE IMPROVEMENT COMMISSIONERS FOR THE DISTRICT OF NEWTON IN MAKERFIELD *v.* THE JUSTICES OF THE PEACE FOR THE COUNTY PALATINE OF LANCASTER.

Highway—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict.* c. 77), *s.* 13—*Disturnpiked Road*—18 & 19 *Vict. c. c.—Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict. c.* 34), *ss.* 47, 49, 50, 51—*Expiration of Turnpike Trusts in* 1877—*Cesser of Turnpike Road—Main Road—Contribution from County for Repair.*

By a local Act (18 & 19 Vict. c. c.) passed in 1855, and incorporating the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), the maintenance of all highways within a district, including a turnpike road, became vested in commissioners. The trustees of the turnpike road thereupon ceased to repair it within the limits of the district. The turnpike trust expired in 1877. The commissioners were the "highway authority" for the district, which was a "highway area" within the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 13:—

Held, that, notwithstanding the special legislation in 1855 providing for the maintenance of part of the road by the commissioners, it only "ceased to be a turnpike road" within the meaning of s. 13 of the Highways and Locomotives (Amendment) Act, 1878, on the expiration of the turnpike trust between 1870

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and the date of passing that Act, and therefore should be "deemed to be a main road," and one half of the expenses of the maintenance of the part within the highway area should be paid to the highway authority by the county authority under s. 13.

Judgment of the Queen's Bench Division (13 Q. B. D. 623) affirmed.

APPEAL by the defendants against a judgment of the Queen's Bench Division upon a special case in favour of the plaintiffs.

The facts are fully set forth in the report of the proceedings before the Queen's Bench Division (1), and it is here only necessary to give the following short statement of them.

The plaintiffs were the improvement commissioners for the district of Newton in Makerfield in the county of Lancaster, and were the highway authority for the district, and the district was a highway area within the meaning of the Highway and Locomotives (Amendment) Act, 1878. The defendants were the county authority as defined by the Highways and Locomotives (Amendment) Act, 1878.

The plaintiffs were incorporated by the Newton District Improvement Act, 1855 (18 & 19 Vict. c. c.), which Act incorporated the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34). The plaintiffs' district was traversed by a turnpike road from Wigan to Warrington, which was maintained under the powers of a private Act (13 Geo. 1, c. x.) and subsequent Acts. Upon the passing of the Newton District Improvement Act, 1855, the maintenance of all streets and highways within their district, including the road, became vested in the plaintiffs by virtue of ss. 47, 49, 50, and 51 of the Towns Improvement Clauses Act. And the trustees of the turnpike road thereupon ceased to repair the road within the limits of the district. The turnpike trust expired in 1877. The plaintiffs demanded from the defendants payment of 60*l.* 10*s.* 10*d.*, being one half of the expenses incurred by the plaintiffs between the 25th day of March, 1882, and the 25th day of March, 1883, in the maintenance of such part of the turnpike road as was within the limits of the district: the defendants refused to pay this sum.

The question for the opinion of the Court was whether the defendants were liable to pay this sum.

(1) 13 Q. B. D. 623.

Dec. 11. *Gorst, Q.C.*, and *H. F. Blair*, for the defendants.
A. Charles, Q.C., and *Alexander Glen*, for the plaintiffs.

The arguments are sufficiently noticed in the judgments of Brett, M.R., and Cotton and Lindley, L.JJ., hereinafter set forth.

Dec. 12. The following judgments were delivered:—

BRETT, M.R. In this case before the year 1855 a Turnpike Act either constituted or regulated a road from Warrington to Wigan, and that road, which was a road from one large place to another large place in Lancashire, passed through Newton in Makerfield. That was an ordinary Turnpike Act, and the road was an ordinary turnpike road, and that turnpike road would be in the minds of all ordinary persons the turnpike road from Wigan to Warrington. In the year 1855, Newton in Makerfield wished to have powers within itself; it wished to have the power of dealing with so much of this turnpike road from Warrington to Wigan as passed through what is now the district of its commissioners, and so in 1855, it obtained a local Act, which gave to it very great powers with regard to this road, and also with regard to many other matters. It enacted that no toll should be taken at all events on that part of the road running through the district; it enacted that the commissioners as to the part of the road within that district should have the control over the road, and, as they had the control over the road, it made them liable to all the duties with regard to it. Therefore that part of the road, as to the management of it, from the moment that Act came into force in 1855, was certainly wholly taken out of the management of the turnpike trustees of the road from Wigan to Warrington. The powers and rights of the turnpike trustees over that part of the road ceased. The management and control, and duties, and obligations, and rights, with regard to that part of the road, were wholly taken away from the turnpike trustees. But let me see what was the condition of things physically. The turnpike road from Wigan to Warrington is upon the surface of the ground. Under the Turnpike Act the whole of that road was a turnpike road; but upon the day after the Act of 1855 was passed, the road was in precisely the same condition as it was before; the same

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people went over it; the roadway was not touched. Then in 1878 is passed this Highways and Locomotives (Amendment) Act. That Act deals with all turnpike roads in the kingdom. Some of the turnpike roads in the kingdom must have been dealt with as this turnpike road, or a part of this turnpike road had been dealt with; some of the turnpike roads in the kingdom had not been touched. Now, what is this Highways and Locomotives (Amendment) Act, 1878, s. 13? It is dealing with turnpike roads throughout the kingdom. Is there any symptom in that enactment that the legislature took notice of the difference in management of the turnpike roads, is there any intimation in that enactment that they took any notice of these various, but not universal, local Acts, which had dealt with the management of bits of the turnpike roads? There is not a symptom of it. I mean by saying that the legislature took no notice of those local Acts, that it took no notice of the details of them. Now the object of that enactment is apparent, as it seems to me, on the face of it; namely, that the legislature thought that where a long road leads from one great place to another, and passes through a small and now separate district, it would be unfair to put upon that separate district the whole expense of the road, which is not a district road so to say, which is not a road made for and confined substantially to the use of the inhabitants of the district, but which is a road used by the inhabitants of a much larger locality, that is, the whole county; and therefore the legislature was persuaded that it was not fair that the inhabitants of these small districts should be made to pay for the repairs of the road in respect of the whole of the traffic over it in their district, when probably nine-tenths of that traffic was not the traffic of the district, but was the traffic of the whole county. Therefore, in dealing in a general Act with long turnpike roads which might pass through such districts, the 13th section seems to have dealt with each road as only with one road. What road is that? It seems to me that that one road is the actual road which is within the Turnpike Act, the long road which is on the surface of the earth. The words of the section are: "For the purposes of this Act, and subject to its provisions, any road which has within the period between the 31st day of December, 1870, and the date of the passing of this Act ceased to be a turnpike

road:" the phrase is, "any road" and "a" road; "and any road which, being at the time of the passing of this Act a turnpike road, may afterwards cease to be such, shall be deemed to be a main road." A "main" road; therefore any road, which has ceased to be a turnpike road, shall be afterwards a main road. Now, what road is that? It seems to me that it is the road which was the turnpike road under the Turnpike Act, and which in truth always was a main road, and which here is called a main road to distinguish it from its condition when it was a turnpike road. It had been a turnpike road; it is now to be called a main road. Then having made it into what in this section is called a main road, the legislature proceeds, "one half of the expense incurred .... by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county." Therefore, having dealt with the whole turnpike road which they have made into a main road, when they come to deal with that which is within these districts, they call it a part of that road; it is a part of the road; it is not a new road. So that it seems to me now to be clear upon the section itself that it has only dealt with the one road, and then has dealt with a part of that one road.

In the case of the Rochdale roads, this section was before the Divisional Court (1) and before this Court of Appeal (2) and then before the House of Lords. (3) The Divisional Court came to a conclusion with regard to all those Rochdale roads, the judges who took part in that decision saying, in effect, that they did not distinguish between them; but they declared that they dealt with all those roads as one. They came to the conclusion that the parts of the roads never became main roads under this section. Now this Court not having the invaluable assistance which we have lost, and which I for one am always deploring, and being without the valuable assistance of Lord Bramwell, came to the conclusion that, under this 13th section, whenever mere bits of roads were separated from the long road, they became main roads; that is the conclusion which we came to. When the case went to

(1) 6 Q. B. D. 525. (2) 8 Q. B. D. 12.
(3) 8 App. Cas. 494.

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the House of Lords, our view in respect of that was set right in this way, as it seems to me, that the House of Lords held that those bits of roads had never become main roads at all. That seems to me to have been the opinion of Lord Bramwell in the House of Lords. This 13th section is not easy, and Lord Blackburn had doubts about it. He came eventually, but with doubt, to the same conclusion that Lord Bramwell did; but he had not such a clear mind upon it. It is useless for me to say whether I should have agreed or not; nevertheless, I must confess that my mind, enlightened by Lord Bramwell and by what took place afterwards, has come to this, that if I had to decide the case now, I should decide it in the same way as it was in the House of Lords. I am convinced that the opinion which I had at the time, when the case was before the Court of Appeal, was wrong, and that what Lord Bramwell said, as I understand him, was the right view of this section; the roads had not become main roads at all. That seems to me to have come clearer to the mind of Lord Blackburn when he came to *Justices of West Riding* v. *Reg.* (1), because I think his judgment in that case cannot be understood in any other sense but this; he says that although the management of the part of the road is by the local Act taken out from the turnpike trust to the fullest extent, nevertheless this 13th section dealt with but one road, and it disregarded the mode in which any part of that long road was managed, and it said that a part within a district does not become a main road. It may be that there was a difference in the circumstances of the roads. But what is the use of quoting authorities? We come back to this, that the authority of a case is only useful for the principles which are enunciated by a Court, and it is not an authority as to every minute fact in the case, and for the facts in the case which were overlooked and not dealt with; the case is not an authority as to those facts, which were not in the minds of the judges who gave the decision. As to the exact time when the road becomes a main road, or as to the exact time when the part of it which is to be dealt with in the section was taken out from the management of the turnpike trust, that question never was in the minds of any one of the Courts or the House of Lords,

(1) 8 App. Cas. 781.

from the beginning of the *Rochdale Case* (1) till the end. Now we have to deal with it, and it seems to me that the management of this bit of road was altered in 1855. But when this long road from Warrington to Wigan, the turnpike road, is made a main road, it is necessary to deal with this part of the 13th section which never was dealt with before. Then it is "any road which has within the period between the 31st of December, 1870, and the date of the passing of this Act ceased to be a turnpike road." I have come to the conclusion that there the legislature is speaking of the long road which has become a main road; and the question is, when did that long road, treated by itself, without having regard to any of its parts, cease to be a turnpike road? It seems to me that it ceased to be a turnpike road at the time when the Act which made it a turnpike road ceased to have that effect; that is at the efflux of time named in the Turnpike Act. That in this case was 1877, and this long road from Warrington to Wigan, which had always been a turnpike road up to 1877, then ceased to be a turnpike road and became a main road. But that is within the limit which is named in the Act; that is after 1870, and therefore it seems to me that the judgment of the Divisional Court was right, and that it was in 1877 that this long road became a main road, and that then by force of the 13th section, from the time mentioned in it, half the expense of repairing the part of that main road which is within this district, is to be borne by the county. I am of opinion, therefore, that the judgment of the Divisional Court was right, and ought to be affirmed.

COTTON, L.J. The question is what is the true effect of the 13th section of the Act of 1878? Undoubtedly that section is a fruitful source of litigation, and its construction is very doubtful. But we must do our best with it.

This case is remarkable in one way, namely, that the counsel for the appellants contended that two cases in the House of Lords had settled this case in their favour, and the counsel on the other side equally contended that those two very same decisions were decisions in their favour. Certainly assistance is to

(1) 8 App. Cas. 494.

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be gained from those two cases, and the latter of the two cases, the *Sheffield Case* (1), lays down a rule, which we cannot depart from in construing this section of this Act of Parliament. But, according to my view, the two decisions in the House of Lords are not in favour of the contention of the appellants, and certainly, in my opinion, as I will shew presently, did not decide the point in favour of the appellants.

What did the *Rochdale Case* (2) decide? This Court had held that where a portion of road, which was part of a turnpike road, had come under the operation of an Act very like the Act which was incorporated into the present Act of the appellants, it ceased to be a turnpike road, and it became a main road under s. 13. The House of Lords differed from that. They said, what must be looked at is the entire road, and it is only when the entire turnpike road ceases by the effluxion and by the cesser of the powers to be a turnpike road, that it becomes a main road, and that it cannot be said, because a bit of that road has ceased to be subject to the trusts of the Turnpike Act, that it has become a main road. A main road under this section is that road which reaches from one terminus to the other, and when that ceases to be a turnpike road by the cesser of the powers and trusts created when the turnpike trust was originated, it becomes a main road, and then half the expense of keeping it in repair is to be borne by the county. When the turnpike road, which, the House of Lords says, means the entirety, ceases to be a turnpike road, then as to every part thereof which is within the limits of any highway area, half the cost of the maintenance shall be paid to the highway authority by the county authority of the county.

What we have to consider is whether, in 1855, when local legislation existed, this was no longer part of the turnpike road, and that, as I understand it, was the principle laid down by Lord Blackburn in deciding the *Sheffield Case*. (1) Undoubtedly, the facts of the *Sheffield Case* (1) were, to my mind, very different from this, because the section which prevented there the trustees of the turnpike road from laying out any money in repairing the portion of the turnpike road which was in the particular district there in question, was contained in the very Act of Parliament

(1) 8 App. Cas. 781. (2) 8 App. Cas. 494.

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which constituted the trusts of the turnpike road, and therefore that is a very different circumstance. But in all these cases what one must look at, is not the actual decision as between the parties, but what were the reasons laid down by those who gave that decision, for the purpose of arriving at the conclusion at which they did; and unless one does that, one gets really into an infinite puzzle in determining whether one judgment ought to bind the Court as to the judgment to be delivered in another case. If the judges, or the House of Lords lay down a principle which covers the case which they decide, then we ought to apply that principle in another case. What in the *Sheffield Case* (1) does Lord Blackburn say? He says, at p. 793, "But I will assume (what I do not decide) that the legislature have, for whatever reason, said that the trustees shall neither spend money nor levy toll on any portion of the turnpike road from Wakefield to Sheffield, which should at any future time be within the ambit of the contiguous houses forming the towns of Sheffield, Barnsley, and Wakefield. Would that prevent those portions from being part of the turnpike road from Wakefield to Sheffield within the meaning of the Highways and Locomotives (Amendment) Act 1878, s. 13? If the words used had been like those of s. 6, that those portions should cease to form or be part of the turnpike road, I should have thought so." Section 6 of the Turnpike Act has these words: "certain portions of the turnpike road shall," on certain events happening, "respectively cease to form or be considered as part or parcel of the said turnpike road." Then he goes on to deal with this—that if that which was made part of the turnpike road, if that which came within the two termini, was by plain and express terms made not to be any longer part of it, then of course one must so deal with it: "but when we are construing an Act of Parliament in which the legislature have said that when a turnpike road is made from one terminus to another"—and those words are important—"they will assume that it is a main road, that is a road for carrying through traffic from, in this case, Sheffield to Wakefield"—and here from Warrington to Wigan—"I cannot think that a portion of that road is to be considered as no longer part of that turnpike road,

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merely because no turnpike is to be erected on that part." Now, undoubtedly, what he is there referring to as not having the effect of the words contained in the 6th section of that Act, is different from what we find in the present case. But, as I understand, he does recognise and put in form that which was decided, I think, in the previous case, that under s. 13 one must look at the entire road from terminus to terminus—here from Wigan to Warrington—and that entirety does not cease to be a turnpike road or become a main road till the powers have expired, and unless some clear enactment provides that a piece of road is to be considered no longer as part or parcel of that turnpike road, then it must be considered as part of that road which ceases to be a turnpike road and becomes a main road, if it so ceases between 1870 and 1878.

There are no words at all which in terms say that these parts of the turnpike road within this district shall cease to be part or parcel of the turnpike road. Large powers are given to the local authorities; they are to expend the money, and not the turnpike trustees. But, in my opinion, it is merely giving certain special powers to the local authority over a particular portion of this turnpike road. It cannot fairly, to my mind, be considered as shewing that that which is part of the turnpike road under the trust shall no longer be considered as part and parcel of it. Then, if that is so, we must apply what was decided in the *Sheffield Case* (1), and undoubtedly it has a curious result in the present case, because the local authorities themselves have, from 1855, been maintaining and repairing this road out of the funds which they raise, and in fact the decision of the Court below will relieve them to the extent of one half of that by throwing it upon the county. But if that is the consequence and result of the true interpretation of this section, we are bound so to construe it, having regard to what the House of Lords has decided, and the principle on which it decided the *Sheffield Case* (1): we cannot mind what the consequences may be: we cannot turn from the true construction simply because the true construction of that section may produce an effect which, the point not being before Parliament when it passed this section, it never thought of. I

(1) 8 App. Cas. 781.

agree that s. 13 cannot apply to anything which, on the 31st of December, 1870, is not part of the turnpike road which afterwards becomes a main road, because it is only every part of the main road which, on the 31st of December, 1870, is part of the turnpike road, to which the directions as to the expense will apply: nevertheless, in the present case, in my opinion, the effect of the legislation of 1855, as regards this particular district, was not sufficient to have the same operation and effect as Lord Blackburn said would be necessary, in order to prevent s. 13 from applying to that portion of the road, when the entirety of the turnpike road then existing became a main road under the operation of s. 13.

It may be that a distinction can be found between some of the roads in the *Rochdale Case.* (1) But the ground of that decision was one which applied simply to all the roads altogether, without any distinction between the one or the other, and in my opinion, therefore, we ought not to say that that judgment in that case of the House of Lords, must be considered as deciding this case in favour of the appellants here. It was a matter which does not, to my mind, form any part of their judgment, and cannot be considered as in any way binding us or enabling us to decide, as we are asked by the appellants to decide, having regard to what in fact was laid down as the rule in the *Rochdale Case* (1), and the rule laid down by Lord Blackburn in the *Sheffield Case* (2), as to the proper mode of deciding whether a particular portion of the road was or was not to be considered as still part of the turnpike road. In my opinion, therefore, having regard to these cases in the House of Lords, this decision is right.

LINDLEY, L.J. I am of the same opinion, and I will state as shortly as I can the reasons which have induced me to come to that opinion.

Now what we have to do is to construe s. 13 of this Act, 41 & 42 Vict. c. 77. Sect. 13 does not stand alone. It is one of a group of sections, and in order to understand it we must look on a little further than s. 13, and study the 14th, 15th, 16th, and 17th sections, which are a portion of the same group. I have read them with care, and I will make a few observations upon

(1) 8 App. Cas. 494. (2) 8 App. Cas. 781.

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them as I go on. We start with this—that the district is a highway area within the meaning of the Act of 1878. It is in fact, within s. 14, an urban sanitary district. We are further told that the road with which we have to deal, is a road running from Warrington to Wigan, and it is in the county of Lancaster. We are further told that in 1855 this district was formed, and that then the maintenance of that portion of the Warrington and Wigan road which was in the district devolved upon the district itself. That being the state of things, the rest of the road remaining as it had been, we have to apply s. 13. Now s. 13 runs thus: "For the purposes of this Act and subject to its provisions, any road which has, within the period between the 31st day of December, 1870, and the date of the passing of this Act, ceased to be a turnpike road." We must stop there and consider what "any road" means, and what "ceasing to be a turnpike road" means. "Any road" must mean there a turnpike road, otherwise it could not cease to be a turnpike road. It must mean, having regard to the other provisions of the Act, a road within the county. That is made tolerably plain by reference to a subsequent section, s. 17, which is dealing with county roads or roads in the county. We come, therefore to this, that it is any turnpike road in the county. Then we must go a little further: "ceased to be a turnpike road;" does that apply to a portion of the road being taken out of what I may call the turnpike trust, or does it mean the whole of the turnpike road ceasing to be a turnpike road? That, which is an extremely difficult question, is concluded by authority. We are free from that; we need not discuss that; it has been decided in the House of Lords that the expression "any road" means the whole turnpike road. Let us go back; let us read it; "the whole of the turnpike road ceased to be a turnpike road." Did it between those dates? Certainly it did. The statement in the special case leads to that conclusion. The whole of this turnpike road, which is the construction to be put upon "any road" in the county, ceased to be a turnpike road in 1877, according to the statement in the case. Now, what is to happen? If it ceases to be a turnpike road, then it shall be deemed to be a main road. Now the notion of a main road and what is meant by a main road may be gathered by

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looking at s. 15, which empowers the authorities to declare a highway which is not a turnpike to be a main road. The section is this: "Where it appears to any highway authority that any highway within their district ought to become a main road by reason of its being a medium of communication between great towns, or a thoroughfare to a railway station, or otherwise, such highway authority may apply to the county authority for an order declaring such road, as to such parts as aforesaid, to be a main road." Therefore we see what is meant by a main road. It is a main road by reason of its being a medium of communication between great towns, or an important thoroughfare of the like nature. If the statute is construed by the light of those decisions in the House of Lords, the whole of this road is to be deemed to be a main road; and what is to happen then? One half of the expense incurred by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority. Now that language is very strong; it is as to the whole road; and not only as to the whole road but as to every part thereof which is within the limits of any highway area. I turn to s. 14, that includes any part which is within an urban sanitary district, or any highway district, or a highway parish not included in any highway district, or any urban sanitary authority. It is clear to me that this case is brought within the terms of that section, when I construe the words in the way in which the House of Lords said, "any road" shall be construed. In the *Rochdale Case* (1) it may be that there was a difference in the roads; but I have looked at all the judgments which were delivered in that case in all the courts, and I cannot find that that point was alluded to by any judge. I have not forgotten that passage in the judgment of Lord Blackburn (2) which may be considered as alluding to it, but I cannot find any reason in any of the judgments, which tends to shew that any other judges drew any distinction at all between the roads. I can find no reasoning specially applicable to any such case.

(1) 8 App. Cas. 494. (2) 8 App. Cas. 497.

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Then, when we come to the *Sheffield Case* (1), we are pressed with the decision in it because in the *Sheffield Case* (1) what we have to deal with is this, there were certain portions of turnpike roads which were not subject to the turnpike trusts. Those portions, therefore, were repairable, I suppose, by the parish or local authority, but at all events they were not repairable by the turnpike trustees. Nevertheless, when the trusts of the turnpike road ceased, when the whole turnpike road became a main road, the county had to pay one-half of the expense of repairing those portions of the main road which the county had had nothing to do with before. I confess it did strike me as a little bit strange that the consequence of our decision would be this, to throw upon the county one-half of the expense of repairing a portion of the road which for many years had been exclusively repaired by this district. But the same result followed in the *Sheffield Case* (1), and what strikes me as removing a good deal of the pressure of that apparent paradox is s. 16 of this very Act, because in that is a remedy for that very state of things. Sect. 16 says this: "If it appears to a county authority that any road which," within the period referred to, "ceased to be a turnpike road ought not to become a main road in pursuance of this Act," a remedy is given for the hardship. It appears to me for these reasons, taking s. 13 as it is, and construing it by these decisions in the House of Lords, the inevitable consequence is that this appeal ought to be dismissed.

Judgment affirmed.

Solicitors for plaintiffs: *Field, Roscoe, Field, Francis, & Osbaldeston, for James E. Worsley, Warrington.*

Solicitors for defendants: *Ridsdale & Son, for Frederick C. Hulton, Preston.*

(1) 8 App. Cas. 781.

J. E. H.

[IN THE COURT OF APPEAL.]

1885
Feb. 27.

EX PARTE MILES. IN RE ISAACS.

Bankruptcy—Stoppage in Transitu—End of Transit—Destination—Goods bought by Commission Agent in England for Foreign Principal—Bankruptcy of Agent.

A commission agent in London was employed by merchants at Kingston, Jamaica, to buy goods for them in England. He ordered the goods of the manufacturers "for this mark," there being in the margin of the letter which gave the order a mark consisting of two letters, with "Kingston, Jamaica," added. The manufacturers knew from previous dealings that this mark had been used by the Jamaica firm. The goods were to be paid for by six months bills drawn by the manufacturers on the commission agent and accepted by him. On the 11th of September the commission agent wrote to the manufacturers, telling them to pack the goods and mark them with the mark previously mentioned, and to forward them to specified shipping agents at Southampton, for shipment by a particular ship, "advising them with particulars for clearance." On the 13th of September, the manufacturers sent the invoice of the goods to the commission agent, telling him that they had that day forwarded the goods by railway to the shipping agents "with the usual particulars for clearance." The same day the manufacturers wrote to the shipping agents, sending them the particulars of the goods, and adding, "which please forward as directed." The particulars described the goods as marked with the letters originally given by the commission agent, and the words "Kingston, Jamaica," and numbered with specified numbers, but the columns for "consignee" and "destination" were left in blank. The cost of the carriage to Southampton was paid by the manufacturers. On the 14th of September the commission agent sent to the shipping agents particulars of the goods, giving the name of the Jamaica firm as consignees, and stating the destination of the goods to be Kingston, Jamaica. The goods were shipped on board the vessel, the bills of lading describing the commission agent as consignor, and the Jamaica firm as consignees. After the ship had sailed, but before her arrival at Jamaica, the commission agent stopped payment, and the manufacturers, who had not been paid for the goods, gave notice to the shipowners to stop them in transitu :—

Held, that, as between the commission agent and the manufacturers, the transit was at an end when the goods arrived at Southampton, and that the notice to stop was given too late.

Ex parte Watson (5 Ch. D. 35), distinguished.

M. B. ISAACS, of London, who traded as Elkin & Co., was employed as a commission agent by Morrice & Co., of Kingston, Jamaica, to purchase for them boots and shoes from Turner & Co., of Northampton, Isaacs receiving a commission for his services. On the 3rd of July, 1883, he wrote to Turner & Co., "Inclosed we

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beg to hand you two orders of boots and shoes for this mark, which be good enough to execute, and advise us when we may expect delivery." In the margin of the letter was a mark consisting of the letters "E. M.," with the words "Kingston, Jamaica," added. Turner & Co. were aware from previous dealings that this mark had been used by Morrice & Co. On the 11th September, 1883, Elkin & Co. wrote to Turner & Co., "If the boots on order for this mark are ready, or a portion thereof, be good enough to pack them as usual, numbering the packages as per margin upwards, and forward them at latest on the 13th inst. to Dunlop & Co., Southampton, for shipment per R. M. steamer *Moselle*, advising them with particulars for clearance." In the margin of the letter was a mark consisting of the letters "E. M.," with the number "1768," and with "Kingston, Jamaica," added. On the 13th of September Turner & Co. wrote to Elkin & Co., "Inclosed we have the pleasure of handing you invoice of goods to your esteemed order, which we have forwarded this day per L. and N. W. Railway, to Dunlop & Co., Southampton, with the usual particulars for clearance." The same day Turner & Co. wrote to Dunlop & Co., "At foot we hand you particulars of twenty-six trunks sent to your care per rail, which please forward as directed." The particulars mentioned the number of packages, and the description and value of the goods, and described the packages as marked "E. M., Kingston, Jamaica," and numbered 1768-1793, and to be shipped per *Moselle*, but the columns for "consignee" and "destination" were left in blank. The cost of the carriage to Southampton was paid by Turner & Co. The goods were to be paid for by six months bills drawn by Turner & Co. on Elkin & Co., and accepted by them. On the 14th of September, Elkin & Co. wrote to Dunlop & Co., sending them particulars of the twenty-six packages "forwarded to your care per rail for shipment per steamer of the 17th inst." The particulars described the goods in the same way by mark and numbers, and stated also that the "consignees" were Morrice & Co., and the "destination," "Kingston, Jamaica." The goods were shipped accordingly, the bills of lading (which included other goods) describing Elkin & Co. as being the consignors and Morrice & Co. as being the consignees. The ship

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sailed from Southampton on the 17th of September. On the 21st of September Turner & Co. heard that Elkin & Co. had stopped payment, and on the 28th of September they gave notice to the shipowners to stop the goods (which had not been paid for) in transitu. The shipowners telegraphed to their agent at Jamaica, and the goods were stopped. Isaacs was afterwards adjudicated a bankrupt, and the goods were sold, and the proceeds of sale deposited in joint names in a bank to await the determination of the validity of the stoppage in transitu. The registrar held that the transit was not completed, and that the notice was effectual, and ordered the money to be paid to Turner & Co. The trustee of Isaacs appealed.

Aspland, for the appellant. The question is whether the transit was not at an end when the goods got into the hands of the forwarding agents at Southampton appointed by Elkin & Co., who were the purchasers as regarded Turner & Co. There was no privity of contract between Turner & Co. and Morrice & Co. It was only by an accident that Turner & Co. knew that the goods were to go to Jamaica. They sent the goods to Dunlop & Co., telling them to forward them "as directed." That must mean "as directed" by Elkin & Co. In this advice note the names of the consignees and the destination of the goods were left in blank. A new destination was to be given to the goods by Elkin & Co.; and, as between them and Turner & Co., the transit was at an end when the goods had reached Southampton, and consequently the notice to stop was given too late: *Dixon* v. *Baldwen* (1); *Valpy* v. *Gibson* (2); *Kendal* v. *Marshall.* (3) Elkin & Co., being commission agents, were purchasers from Turner & Co., though they were vendors to their own principals in Jamaica: *Ireland* v. *Livingston* (4); *Die Elbingen Actien-Gesellschaft* v. *Claye* (5); Benjamin on Sales (3rd ed.), pp. 198, 818.

Sidney Woolf, for Turner & Co. The only destination contemplated by the parties was Jamaica. The letters, taken together, amount to a direction to Turner & Co. to send the goods to Dunlop & Co. for the purpose of being shipped by them to

(1) 5 East, 175.
(2) 4 C. B. 837.
(3) 11 Q. B. D. 356.
(4) Law Rep. 5 H. L. 395, 408.
(5) Law Rep. 8 Q. B. 313.

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Morrice & Co., in Jamaica. No fresh destination was to be given to the goods by Elkin & Co. after they had reached Southampton: from the first there was no doubt what the ultimate destination was to be. *Dixon* v. *Baldwen* (1) is distinguishable; *Kendal* v. *Marshall* (2) is in the respondents' favour. The fact that the carriage to Southampton was paid by Turner & Co. is immaterial. *Ex parte Watson* (3) shews the importance of the marks on the goods, as indicating the destination.

[*Ex parte Rosevear China Clay Co.* (4) and *Rodger* v. *Comptoir d'Escompte de Paris* (5) were also referred to.]

BRETT, M.R. This case, like almost all cases of the kind, runs very fine, and the question on which side of the line it is is an extremely nice one.

The bankrupt was a commission agent, and as such he received an order from Morrice & Co., in Jamaica, to purchase boots and shoes for them from Turner & Co., who are manufacturers of boots and shoes at Northampton. "Commission agent" is a business term very well known to us all.

Now, what is the meaning of sending such an order to a "commission agent?" It means that Morrice & Co. direct or request Elkin & Co. to buy the goods as principals from Turner & Co., and to sell them again as principals to Morrice & Co., but subject to this, that Elkin & Co. bind themselves to sell to Morrice & Co. at the same price that they pay to Turner & Co., adding only to that price the agreed commission between themselves and Morrice & Co. That is the legal meaning and interpretation of such a transaction. It has been so laid down in several cases and it is clear law. Therefore, as between Turner & Co. and Elkin & Co., Elkin & Co. are the purchasers of the goods; the relation between these two firms is that of vendor and purchaser.

Now, the purchaser has become bankrupt, and the question arises whether, as against his trustee, Turner & Co. had a right to stop the goods in transitu, and whether they did effectually stop

(1) 5 East, 175.
(2) 11 Q. B. D. 356.
(3) 5 Ch. D. 35, 43.
(4) 11 Ch. D. 560.
(5) Law Rep. 2 P. C. 393.

them in transitu. That they had a right to stop the goods in transitu cannot be denied, nor that they attempted to do so; but the whole case depends upon whether, when the notice to stop was given, the goods were still in transitu, or whether the transitus was over. That is always an exceedingly difficult question, and before we can apply the law we must see what are the facts, and what is the business view of the transaction.

The first thing, of course, is the order from Morrice & Co. to Elkin & Co., and that is not to order boots and shoes wherever Elkin & Co. please, but it is to order them from Turner & Co., and, if the contract had not been on the terms of commission agency, Morrice & Co. would have been the principals, and Turner & Co. might have charged them with the price of the goods. But, the contract being upon commission agency terms, Elkin & Co. did not pledge their principals' credit to Turner & Co.; they pledged only their own credit, and Turner & Co. were the sole purchasers from them. That being so they sent forward the order of the 3rd of July. [His Lordship read it.] On the margin of it there is, no doubt, put "E. M., Kingston, Jamaica." But the true business interpretation of that order is certainly not, "You are to send the goods to Kingston, Jamaica." The order is, "Be good enough to execute with care, and advise us when we may expect delivery." That is not an order to send the goods to Jamaica. Then on the 11th of September Elkin & Co. write to Turner & Co., "If the boots on order for this mark are ready . . . be good enough to pack them as usual, numbering the packages as per margin, and forward them at latest on the 13th inst." Where to? Not to Jamaica, but "to Dunlop & Co., Southampton, for shipment, per R.M. steamer *Moselle*, advising them"—what?—"with particulars for clearance." It is said that that is an order to Turner & Co. to forward the goods to their destination in Jamaica. Well, the case mainly depends upon whether that is a true interpretation of the letter—whether a direction to send the goods to Jamaica is an order to send them to their destination.

Now, what is meant by sending goods "to their destination?" It seems to me that it means sending them to a particular place, to a particular person who is to receive them there, and not sending them to a particular place without saying to whom.

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Suppose an order was given "Get ready your goods at Liverpool, and send them to London," without saying to whom they were to be sent, how could the man at Liverpool send the goods to London? He might, no doubt, send them by railway to Euston Square Station, but what would be the use of that? Who would get the goods? Could that be called sending the goods to their destination? It can only be said that goods are sent to their "destination" when they are sent to the purchaser, or to the person to whom he directs them to be sent—to a particular person at a particular place. That is the meaning of "destination" in a business sense.

Now, how did Turner & Co., when they received this letter of the 11th of September, understand it? They are business people, and they seem to have construed it just as I should have done:—[His Lordship read the letter of Turner & Co. to Dunlop & Co. of the 14th of September.] That letter shews that they did not understand that they were to direct where the goods were to be sent. They say "which please forward as directed." The meaning of that is obvious, "which please forward as you shall receive directions from the persons who will give you directions," that is Elkin & Co. Then, further, in giving the particulars to Dunlop & Co., they mention, as they had been directed, all the particulars which are necessary for the clearance. That is all. But, when you come to the columns for "consignee," and "destination," the "consignee" being the person to whom the goods are to go, the "destination" the place to which they are to go, both together included in the word "destination" as I have defined it, they leave the "consignee" and the "destination" both in blank. And after this, Elkin & Co. send directions to Dunlop & Co. to forward the goods to Morrice & Co. in Jamaica.

Upon these facts, within what class of cases does this case come? It seems to me that these facts, properly understood as a matter of business, bring the case within the authority of *Dixon* v. *Baldwen*. (1) In that case Lord Ellenborough, C.J., said (p. 186), that "the goods had so far gotten to the end of their journey, that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and that without such orders they would continue stationary."

(1) 5 East, 175.

So, here, the goods, when they reached Southampton, had got to the end of a journey, but so that at that place they waited for new orders from the purchaser (that is, Elkin & Co.) to put them again in motion. As a matter of business it is impossible to say that Dunlop & Co. could properly have shipped the goods for Jamaica without receiving further orders as to the person to whom they were to ship them. They were to receive directions from the purchasers as to the person to whom they were to ship them, and the purchasers were to communicate to them another substantive destination. The first destination was to Dunlop & Co. at Southampton, it being part of the bargain that Turner & Co. were to pay the cost of the carriage to Southampton inside the invoice price—the invoice price was to include that. Elkin & Co. only told Turner & Co. that the goods were going to Jamaica, they did not direct them to give the order to Dunlop & Co. to send them to Jamaica; they reserved that for themselves. The goods, therefore, "waited for new orders from the purchasers to put them again in motion, to communicate to them another substantive destination, and without such orders they would continue stationary." The goods were, therefore, at their journey's end when they reached Southampton. But it is said that the place of the destination of the goods was known to Turner & Co., although the name of the person to whom they were to be sent was not known. That is a new point, but I have not the least difficulty in deciding it. The "destination" of these goods did not mean sending them to Jamaica. In business "destination" means that you must give not only the name of the place to which, but also the name of the person to whom, goods are to be sent. Dunlop & Co. could not send these goods forward to their "destination," that is, to the person who was to receive them at a particular place, without receiving a further order from the purchasers as to the name of the person to whom they were to go. The case, therefore, seems to me to be within the authority of *Dixon* v. *Baldwen*. (1)

It seems to me also to be really within *Valpy* v. *Gibson* (2); that is, within that part of the judgment which has always been treated as an authority, and which almost exactly describes the present case. Wilde, C.J., said (p. 865): "With regard to the

(1) 5 East, 175. (2) 4 C. B. 837.

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right of stoppage in transitu, it appears to us, that, though the defendants knew the goods were to be sent to Valparaiso, and so informed Leech, Harrison & Co. when they forwarded them to Liverpool, yet that Leech, Harrison & Co. could not simply on that information forward the goods to Valparaiso, but that they held them subject to such orders as Brown might give as to forwarding them to Valparaiso or elsewhere; and the transitus was consequently at an end as soon as the goods came to the hands of Leech, Harrison & Co." It is true that this may be said to be only a dictum, because the learned Chief Justice afterwards gave another ground for his decision. But upon mercantile law a written judgment of Wilde, C.J., whether it is dictum or decision, is as strong an authority as you can well have, and the passage which I have read has always been treated as such.

It was suggested that *Ex parte Watson* (1) is a decision to the contrary. I cannot think it is. It seems to me that that case was decided upon the assumption that the purchaser, having made his arrangements for the transit, directed the vendor to send the goods, according to those arrangements, straight from the place of manufacture to Shanghai. There was nothing more to be done as to the transit after the vendor had directed the goods to be conveyed to Shanghai to the person to whom they were to be delivered there. It was assumed that the vendor in that case knew, not only that the goods were to go to Shanghai, but that they were to be delivered to a specified firm there. From the moment, therefore, that the goods left the vendor's hands until they arrived at the place of business of that firm in Shanghai they would be in transit, without the necessity of any new order from the purchaser. That is not like the present case; it is on the other side of the line. The present case is on the same side of the line as *Dixon* v. *Baldwen* (2). I cannot, therefore, agree with the decision of the registrar.

BAGGALLAY, L.J. I am of the same opinion. The question, as in all cases of stoppage in transitu, depends upon a careful examination of the evidence. The material evidence consists of letters, invoices, and documents of that kind, to which a logical commercial interpretation must be given.

(1) 5 Ch. D. 35. (2) 5 East, 175.

The Master of the Rolls has carefully analysed the documents, and I do not propose to go through them again. It is sufficient, in my opinion, to say that the goods were to be sent to Dunlop & Co. at Southampton, where they were to wait for the directions of Elkin & Co. If that is the true view of the evidence, the case seems to be completely within *Dixon* v. *Baldwen*. (1)

LINDLEY, L.J. I think the case is a difficult one; it is very near the line. But the principle to be applied cannot, I think, be better expressed than it was by this Court in *Kendal* v. *Marshall*. (2) The question is, what was the destination of the goods as between the buyer and the seller? The answer to that question is to be obtained from the documents. The documents in the present case are somewhat obscure; but I think, for the reasons which have been given by the Master of the Rolls, that, as between the buyer and the seller, the destination of the goods was Southampton. It is true that they were to go further, but the seller had nothing to do with that. There was not here, as in *Ex parte Watson* (3), an actual bargain between the buyer and the seller that the goods should go straight to Jamaica. In *Ex parte Watson* (3) there was a bargain between the buyer and the seller that the goods should go straight to a specified firm at Shanghai, and that that destination should be stated in the bill of lading. The seller could have obtained an injunction to prevent the goods from going anywhere else. It cannot be maintained for a moment that in the present case the sellers could have restrained Elkin & Co. from sending the goods anywhere they pleased. In truth the destination of the goods was Southampton, and there the transit was at an end.

Woolf asked for leave to appeal to the House of Lords.

BRETT, M.R. If there was a question of law, we might consider it; but it is only a question of fact.

Leave to appeal refused.

Solicitors for trustee: *Spyer & Son.*

Solicitor for respondents: *C. A. Bannister.*

(1) 5 East, 175. (2) 11 Q. B. D. 356.

(3) 5 Ch. D. 35.

W. L. C.

1885
April 24.

[IN THE COURT OF APPEAL.]

Ex parte WARREN. In re HOLLAND.

Bankruptcy—Execution Creditor—Sale under Execution—Notice to Sheriff of Bankruptcy Petition against or by Debtor—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 46 (2), 168.

The notice of a bankruptcy petition mentioned in sub-s. 2 of s. 46 of the Bankruptcy Act, 1883, must be served on the sheriff or his recognised agent (such as the under-sheriff), for the purpose of receiving such notices; it is not sufficient to serve it upon an ordinary bailiff or man in possession.

The effect of the provision of s. 168 that "sheriff includes any officer charged with the execution of a writ or other process," is to bring within s. 46 officers of inferior courts who discharge for those courts duties similar to those which the sheriff discharges for the High Court.

On F., the serjeant-at-mace of the Mayor's Court of London, proceeding to execute a warrant issued to enforce a judgment for more than 20*l.* obtained in that court, he found H., an officer of the sheriffs of London, in possession of the goods of the debtor under a writ issued by the Queen's Bench Division, and thereupon, in accordance with the usual practice, he delivered the warrant to H. for execution. H. sold the goods, and out of the proceeds paid the amount of the warrant to F. The next day notice was served on H. of a bankruptcy petition having been presented against the debtor on which he was afterwards adjudged bankrupt. No notice of the petition was served on F.:—

Held, by Cave, J., that, by virtue of s. 168, H. must under the circumstances be deemed to be "the sheriff" for the purposes of s. 46, sub-s. 2; and that therefore the trustee in the bankruptcy was, as against the execution creditor, entitled to the money.

Held, by the Court of Appeal, that, even if an effectual notice could ever have been served on H., a notice served on him after he had handed over the money to F., and his agency for F. had thus been determined, was ineffectual, and that consequently the execution creditor was entitled to the proceeds of sale.

Appeal from an order of Cave, J., that the proceeds of an execution should be paid over to the trustee in the bankruptcy of the execution debtor.

On the 13th of October, 1884, a writ of execution was issued upon a judgment in the Mayor's Court of the City of London, recovered by W. H. Warren against A. Holland, directing C. Fitch, the serjeant-at-mace of the Court, or "any other serjeants-at-mace," to levy the sum of 104*l.* 12*s.* 6*d.* upon the goods and chattels of Holland, and a warrant to that effect was upon the same day issued and lodged with Fitch.

Several other executions had previously issued out of the Queen's Bench Division of the High Court of Justice against Holland, requiring the sheriffs of London to levy upon his goods the several sums represented by those executions, and warrants thereon were then in the hands of Messrs. Heywood & Hillyer, who were officers or serjeants-at-mace to the sheriffs, for execution, and on the 13th of October, when Fitch attempted to levy under his warrant, he found Heywood & Hillyer in possession of the goods of Holland by virtue of their warrants. Thereupon Fitch, in accordance with the usual custom in such cases, intrusted Hillyer with the execution of the Mayor's Court warrant for 104*l.* 12*s.* 6*d.*

On the 21st of October an order was made by the Queen's Bench Division, in respect of the executions issuing out of that court, authorizing a sale by private contract of the goods of Holland; and on the 22nd of October a similar order was made by the Mayor's Court in respect of the warrant issued by it.

On the 29th of October the sale was carried into effect, and the proceeds were paid to Heywood & Hillyer, who, on the 30th of October, paid over to Fitch, as the serjeant-at-mace of the Mayor's Court, the sum of 104*l.* 12*s.* 6*d.*, representing the amount of the warrant which he had lodged with them.

On the 31st of October Hillyer was served with a notice that a bankruptcy petition had on that day been presented against Holland, on which a receiving order had been made. No notice of the petition was served on Fitch.

On the 6th of December Holland was adjudicated a bankrupt, and C. L. Nichols was appointed the trustee.

The trustee applied for an order that the 104*l.* 12*s.* 6*d.*, which had been deposited in the Mayor's Court to the credit of the action *Warren* v. *Holland*, might be paid over to him as part of the bankrupt's estate.

The motion was heard by Cave, J., on the 9th of March, 1885.

March 9. *Sidney Woolf*, for the motion. The 45th section of the Bankruptcy Act, 1883, deprives a creditor of the benefit of his execution unless it is completed by seizure and sale before

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the date of the receiving order; and s. 46, sub-s. 2, still further restricts his rights, for the sheriff must hold the proceeds for fourteen days, and if within that time he receives notice of a bankruptcy petition he must pay over the proceeds of the execution to the trustee; and by s. 168 the term "sheriff" includes "any officer charged with the execution of a writ or other process." The sole question, therefore, is whether Hillyer was in this case the officer charged with the execution of Warren's writ within the meaning of ss. 46 and 168. No doubt he was.

Cooper Willis, Q.C., for Warren. Fitch was the officer charged with the execution of the warrant in the first instance, and employed Hillyer as his agent for the purposes of the warrant. But, the moment the sale was completed and the proceeds were paid over to Fitch, the agency was concluded, and Fitch could not be fixed with any notice afterwards given to Hillyer, nor was Hillyer then under any obligation to communicate any notices he received to Fitch; and, as notice of the bankruptcy petition was not served on Fitch, Warren is entitled to the money.

CAVE, J. In this case I am of opinion that the application of the trustee must be granted. The 46th section of the Act, sub-s. 2, provides that where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding 20*l.*, the sheriff shall deduct the costs of the execution from the proceeds of sale, and retain the balance for fourteen days, and if within that time notice is served upon him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor. Now by s. 168 the term "sheriff" is defined to include—the section does not say that that term "means," which is the expression used in some other parts of the section, but that it "includes"—"any officer charged with the execution of a writ or other process." It is clear to my mind, therefore, that in this case the term "sheriff" did include Hillyer, because he actually was the person charged by Fitch with the execution of this writ, and, in fact, he did execute

it; and as the sheriff in this case, which expression must be taken to mean Hillyer, did receive notice within the fourteen days of a bankruptcy petition having been presented against the debtor, it follows that the balance of the proceeds of sale must be paid over to the applicant, who is the trustee in the bankruptcy.

H. L. F.

From this order Warren appealed. The appeal was heard on the 24th of April, 1885.

Cooper Willis, Q.C., for the appellant. No sufficient notice was given of the bankruptcy petition; the notice was given to the wrong person. After Hillyer had sold the goods, and had handed over to Fitch his share of the proceeds of sale, he ceased to be an agent for Fitch, and a notice given to him was of no avail. Hillyer was not then, within the meaning of s. 168, an "officer charged with the execution of" the writ in the Mayor's Court, if he was before.

Ringwood, for the trustee. The notice was given to the proper person. Hillyer was the officer actually "charged with the execution of" the Mayor's Court writ, and was, therefore, by virtue of s. 168, included within the word "sheriff" in s. 46.

BRETT, M.R. This difficulty has arisen from the fact that s. 46 of the Bankruptcy Act of 1883 is drawn in the modern form. The corresponding s. 87 of the Act of 1869 was drawn in the old form, enumerating the different persons with whom it was intended to deal. If s. 46 had been drawn in the same way it would have said, "the sheriff, or, in the case of a sale under the direction of the Mayor's Court, the serjeant-at-mace of that Court." As s. 46 is drawn, it says that notice of a bankruptcy petition is to be served on "the sheriff." If that had stood alone, officers of other Courts, who perform duties similar to those which the sheriff performs for the High Court, would not have been within s. 46; the bailiff of a county court would have been excluded, and so would the serjeant-at-mace of the Mayor's Court. In order to include such officers there is added in s. 168 what is called an interpretation clause. It is not strictly an interpreta-

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tion clause, but it says that, "in this Act, unless the context otherwise requires, 'sheriff' includes any officer charged with the execution of a writ or other process." This, as it appears to me, means that the word "sheriff" includes persons who discharge duties similar to those which are discharged by a sheriff—not every bailiff or man in possession. Consequently, the serjeant-at-mace of the Mayor's Court, who discharges for that Court duties similar to those which the sheriff discharges for the High Court, is included in s. 46, and the notice of a bankruptcy petition ought to be served on him in the same way as such a notice ought to be served on the sheriff. In my opinion in the case of a sheriff it would not be sufficient to serve the notice on the bailiff or the man in possession under the writ; the notice should be given to the sheriff, or to some recognised agent of his for receiving such notices, i.e., to the under-sheriff, or to a clerk at the sheriff's office. So, in the present case, the notice ought to have been given to the serjeant-at-mace, or to his recognised agent for receiving such a notice; it was not sufficient to give it to the sheriffs of London or one of their officers. Hillyer was the agent of Fitch only for the performance of a part of his duty, viz., to conduct the sale of the goods and hand over the proceeds to him. I do not think that such a notice could be effectually given to Hillyer while he was discharging that duty, but it certainly could not after his agency had come to an end by his handing over the money to Fitch. I think that such a notice could not be effectually given to a sub-agent of a sheriff appointed by him for the discharge of some other part of his duty, but not for the purpose of receiving notices. In my opinion, therefore, no notice of the bankruptcy petition was served on the serjeant-at-mace within the fourteen days, and therefore the execution creditor is entitled to the proceeds of sale. The appeal must be allowed.

BAGGALLAY, L.J. There are two questions: (1.) To whom ought the notice to be given under s. 46? (2.) Was the notice properly given? Now the only person actually mentioned in s. 46 is the sheriff, but, for the purpose of making the provision

applicable to the officers of other courts which do not act through the sheriff, s. 168 was introduced, and the meaning of the word "sheriff" must be ascertained from that section. Reliance is placed on the words, "any officer charged with the execution of a writ or other process," and it is said that any person, to whom the person originally charged with the execution of the writ thinks fit to intrust it, is an officer charged with the execution, and is therefore included under the word "sheriff" in s. 46. I cannot so construe s. 168. I think it means that the word "sheriff" shall include any person lawfully charged with the execution of duties similar to those of a sheriff—not any person to whom the person originally charged with the execution of a writ may depute the performance of a part of his duty. Whether a notice of a bankruptcy petition given to Hillyer before he had handed over the money to Fitch would have been effectual I express no decided opinion, though my present impression is that it would not. But I am satisfied that, so soon as Hillyer's agency was determined by his handing over the proceeds of sale to Fitch, he no longer filled any representative character on behalf of Fitch which could make the notice given to him effectual.

BOWEN, L.J. I am of the same opinion.

Appeal allowed.

Solicitor for execution creditor: *D. Blelloch.*

Solicitors for trustee: *Davidson & Morriss.*

W. L. C.

1885
May 12.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* THE REGISTRAR OF THE GREENWICH COUNTY COURT.

Solicitor—Right of Audience—Bankruptcy—Examination of a Debtor by a Solicitor—Solicitor to be authorised in Writing—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 17, *sub-s.* 4.

The Bankruptcy Act, 1883, s. 17, sub-s. 4, enacts with reference to the public examination of a debtor under that Act, "that any creditor who has tendered a proof, or his representative authorised in writing, may question the debtor concerning his affairs, and the causes of his failure":—

Held, that a solicitor who appears at a bankruptcy court for a creditor who has tendered a proof, is the creditor's representative within the meaning of that sub-section, and is therefore not entitled so to question the debtor without being authorised in writing and producing his authority if required by the Court to do so.

Query, if such solicitor, when his right of audience has been so denied to him, is "a party," within the meaning of s. 43 of the County Courts Act, 1856 (19 & 20 Vict. c. 108), who is entitled to apply to the superior Court for a rule to compel the county court judge to give him audience.

On the 17th of June, 1884, Mr. Ambrose G. Ditton, a solicitor, attended the Greenwich County Court for Messrs. Renton & Co., who had tendered a proof, which had been admitted, of their debt under the estate of one Richard Benjamin Scarborough, a debtor against whom a receiving order had been made under the Bankruptcy Act, 1883. The debtor was present then for the purpose of passing his examination, when Mr. Ditton, stating that he attended for Messrs. Renton & Co., proposed to examine and question the debtor concerning his affairs and the causes of his failure. Thereupon the registrar of the county court, before whom the sitting was being held, asked Mr. Ditton for the authority in writing of his clients, and, upon his not producing it, refused to allow him to examine the debtor, holding that according to s. 17, sub-s. 4, of the Bankruptcy Act, 1883 (1), he was not

(1) The following are the material sub-sections of s. 17 of the Bankruptcy Act, 1883:—

"(1.) Where the Court makes a receiving order it shall hold a public sitting on a day to be appointed by the Court for the examination of the debtor, and the debtor shall attend thereat and shall be examined as to his conduct, dealings, and property.

"(2.) The examination shall be held as soon as conveniently may be after

entitled to question the debtor unless he was authorised in writing by his clients, Messrs. Renton & Co. Mr. Ditton contended that sub-s. 4 of s. 17 did not apply to solicitors, and the Incorporated Law Society supporting his claim, and that of solicitors generally, to such audience in bankruptcy without being required to produce their client's authority in writing, a rule was afterwards applied for and granted by the Divisional Court, calling on the registrar of the Greenwich County Court, and Richard B. Scarborough, to shew cause why Mr. Ditton, acting as solicitor for Messrs. Renton, should not be permitted to question the debtor Scarborough concerning his affairs and the causes of his failure without producing an authority in writing.

No cause was shewn against this rule, but the Divisional Court, consisting of Grove, J., and Hawkins, J., discharged it last Michaelmas Sittings, as they were of opinion that only parties litigant could apply for the rule.

Mr. Ditton appealed.

R. Reid, Q.C., and *Linklater*, for the appellant. The rule nisi is a substitution for the writ of mandamus, and it is given by s. 43 of the County Courts Act, 1856 (19 & 20 Vict. c. 108), which enables "any party requiring" any act to be done by a judge or officer of the county court, to apply to any Superior Court for a rule "calling upon such judge or officer, and also the party to be affected by such act, to shew cause why such act should not be done." The solicitor is a party whose right of audience, which was preserved to him by s. 151 of the Bankruptcy Act, 1883, having been improperly denied to him, has a right to apply to the Supreme Court under this 43rd section. "Party" there is not limited to

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the expiration of the time for the submission of the debtor's statement of affairs.

"(3.) The Court may adjourn the examination from time to time.

"(4.) Any creditor who has tendered a proof, or his representative authorised in writing, may question the debtor concerning his affairs, and the causes of his failure.

"(5.) The official receiver shall take part in the examination of the debtor; and for the purposes thereof, if specially authorised by the Board of Trade, may employ a solicitor with or without counsel.

"(6.) If a trustee is appointed before the conclusion of the examination, he may take part therein.

"(7.) The Court may put such questions to the debtor as it may think expedient."

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a party litigant in a cause in the Court. Besides a solicitor is, as to his right to be heard, in the same position in bankruptcy as a counsel, and if sub-s. 4 of s. 17 of the Bankruptcy Act, 1883, applies to a solicitor, it may equally be said to apply to counsel. The enactment means that the creditor personally, or if he cannot personally attend, his clerk or other proxy authorised in writing to represent him, may question the debtor. But that does not affect a counsel or solicitor who, as before this Act, may still always appear for the client, and that without any written authority. No doubt, as was decided in *Ex parte Broadhouse* (1), a commissioner in bankruptcy was not bound to hear a solicitor who appeared before him, not as the solicitor of the party, but only as the clerk of such solicitor; yet soon after the Bankruptcy Act, 1883, came into operation, Registrar Hazlitt in *Re Landrock* (2) decided that the representative mentioned in this very sub-s. 4, applied not to a solicitor, but to one who came as the proxy of the creditor, and that a solicitor might appear for the creditor and examine the debtor at his public examination without having the written authority of his client.

BRETT, M.R. In this case a gentleman, who is a solicitor, desired under the 4th sub-section of the 17th section of the Bankruptcy Act of 1883, to question a debtor concerning his affairs at the public examination of the debtor; but the registrar of the Greenwich County Court refused to hear him unless he produced an authority in writing. The solicitor declined to do that, and made an application to the Divisional Court, and now here, for a rule directing the registrar of the Greenwich County Court to allow this solicitor to examine the debtor concerning his affairs without producing a written authority, and it is argued that the rule ought to issue on the ground that the 4th sub-section of that s. 17 does not apply to solicitors so asking to examine. It is not denied that if it does so apply the registrar would not have been wrong in requesting any particular solicitor who appeared at that stage to examine the debtor, to produce his authority in writing.

Now, two objections are taken to the granting of this rule, one is, that the solicitor is not the person who can apply for it, for if

(1) Law Rep. 2 Ch. 655. (2) Morrell's Bankruptcy Reports, 21.

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the registrar of the county court was wrong in his view of the Act of Parliament, the person to complain is not the solicitor (even though he assumes to appear for himself alone, or for himself and other solicitors), but the creditor on whose behalf he was about to examine the debtor concerning his affairs. Another is, that even supposing the solicitor is a party, yet that on the true construction of the 4th sub-section, that sub-section does include solicitors, and that, therefore, the registrar was justified in not hearing this solicitor if he did not, when requested, produce his authority in writing.

Now as to the first point, I confess to considerable doubt whether the solicitor can apply. On the one side, if you put it upon the 43rd section of 19 & 20 Vict. c. 108, my opinion is that the solicitor is not within that section—that where that section says, "That any party requiring such act to be done may apply to any Superior Court," the party there means a litigant in the court, and I should say that the creditor at this stage of the bankruptcy, who desires to have the debtor examined, is a litigant within the meaning of those words, but I do not think the solicitor is. But there may be a larger view, namely, that the solicitor in the present case may be assumed to be applying, not merely on his own behalf, but as representing the body of solicitors, and that then it may be said that the registrar of this county court is refusing the body of solicitors the audience to which they are entitled, unless they fulfil a condition he has no right to impose, and that then the Court, protecting their officers as officers, would have a right to interfere and decide that their officers should be heard without the condition. That is one way of stating the case. The other, of course, is that this solicitor has not brought himself within s. 17, sub-s. 4, of the Bankruptcy Act, 1883, and I think he has not, and that, therefore, the other general rule is not one that can be acted upon. I do not think it necessary to determine that rather knotty question in this case, because it seems to me that if the solicitor has a locus standi to appear, still the registrar of the county court was right. Now that will depend upon how to construe this 4th sub-section of s. 17 of the Bankruptcy Act, 1883, and I desire to decide it according to the very words, unless I am prevented from doing so. Therefore the question must be

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whether a solicitor who appears at this stage of the cause is or is not a representative of a creditor, for the section says, "Any creditor who has tendered a proof, or his representative authorised in writing, may question the debtor." Is he his representative? Mr. Reid said if a solicitor cannot examine without producing his authority in writing, a counsel would have also to produce his authority in writing—in other words, he would have to produce something he never gets. He never has any authority in writing from the creditor. He has nothing to do with him except to protect him in court. A counsel cannot act for his client out of court. He can only act for him in court, but in court he has the whole conduct of the cause, and I always desire to express this most firmly—he has the power to act without asking his client what he shall do. He has no master, but he is the conductor and regulator of the whole thing. Therefore it seems to me counsel is not the representative of the creditor, and therefore he does not want any authority in writing. But a solicitor is his client's representative. That is his normal character. He represents his client in court, and he represents him out of court. He acts for him, and in his own name, and therefore in ordinary legal language he is the representative of his client. If then, he is the representative of his client, he is within the words of the statute, and he must be authorised in writing. He must submit to that which, to my mind, is no indignity at all, although the solicitors have taken it up for the moment as a question of indignity, and consequently when asked he must produce his authority and retainer. All we have now to say is that the registrar is entitled to ask for an authority in writing, and if that is not produced, he is entitled to say the solicitor shall not then question the debtor concerning his affairs. Whether a registrar will ask all solicitors, or whether he will ask any particular solicitor in any particular case, is a matter for him and his own feeling of what is right and just to do. I think the case is within s. 17, sub-s. 4, and supposing we have authority to hear the appeal on the application of this solicitor, we decide it against him. The same result would follow if we have no authority to hear him.

Therefore in either view the decision must be against the application.

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BAGGALLAY, L.J. I am of the same opinion. A debtor against whom a receiving order has been made is bound by the 16th section of the Bankruptcy Act, 1883, to submit a statement of his affairs. Having submitted that statement of affairs, the 17th section provides that a special day shall be appointed for his examination, and the debtor shall attend thereat and shall be examined as to his conduct, his dealings, and property. Then the 2nd sub-section provides when the examination shall be held, and then there are four species of questionings to which the debtor is to be subject. The first is under sub-s. 4, "Any creditor who has tendered a proof, or his representative authorised in writing, may question the debtor concerning his affairs and the causes of his failure." The second is by the official receiver. The third is by the trustee of the creditors if there is any then appointed. And the fourth is by the Court itself. Then as regards the first two of those classes of persons by whom the examination is to be conducted, it is stated in what way or how they are to be identified. "The creditor who has tendered a proof, or his representative authorised in writing, may question a debtor concerning his affairs." The official receiver shall take part in the examination of the debtor; and for the purpose thereof, if specially authorised by the Board of Trade, may employ a solicitor with or without counsel." In one case there is no provision for a solicitor or counsel representing the trustee; but there is a provision for the official receiver being represented by counsel. Then we find a creditor who has tendered a proof is made a litigant for this purpose, and he or his representative, if authorised in writing, may question the debtor concerning his affairs. One would have thought the meaning of the 4th sub-section was clear enough that the person who was to question was either to be the creditor or some representative authorised in writing. The question did, as I understand, not arise before the registrar, whether the solicitor was interested in the matter, but the simple question was whether there was to be an examination by the person alleging himself to be the representative of the creditor, unless that person produced the authority of the creditor in writing. There was no objection to allow him to appear and to question the debtor provided he produced his written authority to do so. The case is brought

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before the Court in the fairest possible way, but it appears to me, as far as regards the creditor himself, whose alleged representative was not allowed to represent him, to come clearly within the 4th sub-section. I do not decide the other point, because I hold if this had been an appeal by the creditor himself I should have come to the same conclusion.

BOWEN, L.J. I do not differ from the construction that has been put upon the statute. I also think it extremely doubtful whether there is any appeal in this case by the solicitor, although I do not doubt that if audience is denied to an officer of the court he can appeal to this Court, either by applying for a mandamus, or possibly under 19 & 20 Vict. c. 108, s. 43, which substitutes for a mandamus a rule to compel audience.

Appeal dismissed.

Solicitor for appellant: *E. W. Williamson.*

W. P.

1884
Nov. 22.

[IN THE COURT OF APPEAL.]

LEIGH AND ANOTHER *v.* DICKESON.

Tenancy in Common—Tenants in Common of a House—Landlord and Tenant—Tenant by Sufferance—Use and Occupation—Ordinary Repairs—Contribution between Tenants in Common.

Where one tenant in common has by lease demised his interest to his co-tenant in common, if the tenant in common who was lessee continues in occupation as tenant at sufferance after the expiration of the lease, he will be liable in an action for use and occupation at the suit of his co-tenant in common who was lessor.

One tenant in common of a house who expends money on ordinary repairs has no right of action against his co-tenant for contribution.

Judgment of Pollock, B. (12 Q. B. D. 194), affirmed.

APPEAL by the defendant against the judgment of Pollock, B., in favour of the plaintiffs.

The facts of the case are fully set forth in the report of the proceedings before Pollock, B. (1), and here it is necessary only to make the following short statement of them.

(1) 12 Q. B. D. 194.

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The plaintiffs were trustees of a lady named Eyles, and sought to recover from the defendant the sum of 24*l.* 9*s.* 6*d.*, which they alleged to be due to them from the defendant for the use and occupation by him of three-fourths of premises in Market Lane, Dover, for 264 days at the rate of 45*l.* per annum. In 1860 Mrs. Eyles was entitled to an undivided three-fourths of the house as tenant in common with another; and on the 4th of January in that year she, by lease, let to one Prebble for twenty-one years her interest at the rate of 33*l.* 15*s.* per annum. In 1865 the lease was assigned by Prebble to the defendant, who entered and paid rent. In 1871 the defendant purchased the one-fourth interest of the other tenant in common. On the 6th of January, 1881, the lease expired, but the defendant continued in possession. A correspondence then took place between the plaintiffs and the defendant and their solicitors with a view to continue the tenancy; but the plaintiffs asking for an advanced rent which the defendant was unwilling to pay, no further agreement was arrived at. Upon the facts Pollock, B., came to the conclusion that the occupation by the defendant, which occurred after the expiration of the lease in question on the 6th of January, 1881, must be referred, not to his right as tenant in common, but to his continuing in occupation as tenant at sufferance. He therefore gave judgment for the plaintiffs for 24*l.* 9*s.* 6*d.*, the amount claimed for use and occupation. (1)

The defendant by way of set-off and counter-claim sought to recover from the plaintiffs 80*l.*, which, he alleged, he had laid out and expended in substantial and other proper repairs and improvements upon the premises since the expiration of the lease. Pollock, B., was of opinion that the set-off and counter-claim could not be sustained in law, and gave judgment upon it for the plaintiffs. (2)

Nov. 8, 10. *Finlay Q.C.*, and *C. A. Russell*, for the defendant. The continuance of the defendant's possession after the expiration of the lease was due to his right as a tenant in common, and he did not become a tenant by sufferance. He was not even a tenant at will, and he was not entitled to exclusive possession as against

(1) 12 Q. B. D. 194, at p. 196. (2) 12 Q. B. D. 194, at p. 200.

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his co-tenants in common. A tenant in common occupying the premises held in common, not excluding his co-tenants in common, is not chargeable by them with an occupation rent: *M'Mahon* v. *Burchell.* (1) At common law one tenant in common could not maintain an action of account against another, unless the latter had been constituted bailiff to the former of the undivided moiety and had accepted the appointment. And in order that an action might be maintained under 4 Anne, c. 16, s. 27, there must have been something more than a mere perception of profits: the tenant in common, who was made defendant, must have received more than his just share of the profits: *Henderson* v. *Eason.* (2) Where a tenant in common has not the exclusive occupation, he cannot be made liable by his co-tenants for rent, unless an express contract by him to pay it can be proved.

Then as to the liability of the plaintiffs to contribute to the costs of the repairs executed by the defendant, it is plain that a duty was cast upon one co-tenant to bear his share of the expense of keeping in good condition the property held in common. At common law the writ de reparatione faciendâ lay between tenants in common: Fitzherbert Nat. Brev. 127, and Registrum Brevium, 153 b; it may be that this writ was abolished by 3 & 4 Wm. 4, c. 27, s. 36, but an action on the case of a similar nature may remain: in many cases in which a real or mixed action has been abolished, a personal action is maintainable: see per Pollock, C.B., in *Varley* v. *Leigh.* (3) The dictum of Holt, C.J., in *Tenant* v. *Goldwin* (4) that the writ de reparatione faciendâ was grounded on the custom of a place and not on the common law, is erroneous and is inconsistent with other authorities, such as Co. Litt. 200 b, and the resolution in *Lewis Bowles's Case* (5) cited by Pollock, B., in delivering judgment. (6) A writ of contribution also lay at common law between tenants in common: Viner's Abridg. tit. Contribution and Average, p. 562, pl. 14. The writ de reparatione faciendâ and the writ of contribution treat tenants in common as bound to each other to repair. At

(1) 2 Phil. 127; 5 Hare, 322.
(2) 17 Q. B. 701, at p. 718.
(3) 2 Ex. 446, at p. 450; see also *Thomas* v. *Sylvester*, Law Rep. 8 Q. B. 368.
(4) 2 Ld. Raym. 1093.
(5) 11 Rep. 82 b.
(6) 12 Q. B. D. 197.

all events, according to the principles of equity, if the defendant is liable for an occupation rent, he must be allowed all sums properly expended by him in substantial repairs and improvements: *Pascoe* v. *Swan* (1); *Teasdale* v. *Sanderson* (2); 2 Seton on Decrees, 1018 [4th ed.].

Edward Pollock, for the plaintiffs.

[BRETT, M.R. The counsel for the plaintiffs may assume that they are entitled to recover for the rent claimed; but it may be that the right to recover is accompanied by the condition, that they shall pay what is just for repairs and improvements.]

It is only in a suit for a partition that an allowance is made for repairs and improvements: in a suit of that kind the Court of Equity has all the materials before it, and can do full justice between the parties: *Agar* v. *Fairfax* (3); *Swan* v. *Swan*. (4) The writ de reparatione faciendâ existed simply for the benefit of the public.

[LINDLEY, L.J. In the form of the writ de reparatione faciendâ given in Fitzherbert Nat. Brev. 127, it is stated that the tenants in common "are bound to repair and keep up the same mill." It may be that the writ related to a mill to which those dwelling in the neighbourhood were bound to send their corn to be ground, and therefore that the owners of the mill were bound to keep it in repair. At least I suggest that as an explanation.]

At all events, that writ will not apply to the present case, because neither the plaintiffs nor the defendant were bound to repair the house.

Finlay, Q.C., did not reply.

Cur. adv. vult.

Nov. 22. The following judgments were delivered:—

BRETT, M.R. The cestui que trust of the plaintiffs and the defendant were tenants in common of a house: the defendant has done certain repairs which may be taken to have been reasonable and proper: he has paid for, or at least has become liable to pay for, those repairs. An action having been brought against him, he

(1) 27 Beav. 508.
(2) 33 Beav. 534.
(3) 2 W. & T. (L. C. in Eq.) 419, at p. 445.
(4) 8 Price, 518.

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seeks by a counter-claim to recover that money which he has paid or is liable to pay. The cestui que trust of the plaintiffs has derived benefit from the expenditure incurred by the defendant, and the defendant seeks to reimburse himself for the cost of the repairs in proportion to the benefit which the tenant in common with him has received. Does this counter-claim fall within any legal and recognised principle? There was no express request by the tenant in common with him that he should expend the money. What are the legal conditions which enable a man who has expended money to recover it from another? If money has been expended at the express request of another, an action will lie at the suit of the person expending it against the person pursuant to whose request it has been expended. If a person is employed as agent in a business which requires an expenditure in order that it may be carried on, it is equally clear that the principal must indemnify his agent for the expenditure which he incurs. But the law has gone further; it has been laid down that if one person has requested another to do an act which will cost him money, that is, which will expose him to a legal liability to pay money, the law will imply a promise on the part of the person making the request to indemnify the other for the expenditure to which he has been subjected. But the law has gone even further, and it has been held that if a principal employs an agent in a business, in which, by the usage thereof known to both parties at the time of employment, the agent, although he is under no liability by law, is bound, on pain of suffering an injury or loss in his business, to pay money, the principal is bound to indemnify the agent for the money which the latter may expend in the transaction of the business on his principal's behalf. (1) That, no doubt, is an extreme case, but it has been so decided. But it has been always clear that a purely voluntary payment cannot be recovered back. Voluntary payments may be divided into two classes. Sometimes money has been expended for the benefit of another person under such circumstances that an option is allowed to him to adopt or decline the benefit: in this case, if he exercises his option to adopt the benefit, he will be liable to

(1) It is presumed that the Master of the Rolls was alluding to *Read* v. *Anderson*, 13 Q. B. D. 779.

repay the money expended; but if he declines the benefit he will not be liable. But sometimes the money is expended for the benefit of another person under such circumstances, that he cannot help accepting the benefit, in fact that he is bound to accept it: in this case he has no opportunity of exercising any option, and he will be under no liability. Under which class does this case come? Tenants in common are not partners, and it has been so held: one of them is not an agent for another. The cost of the repairs to the house was a voluntary payment by the defendant, partly for the benefit of himself and partly for the benefit of his co-owner; but the co-owner cannot reject the benefit of the repairs, and if she is held to be liable for a proportionate share of the cost, the defendant will get the advantage of the repairs without allowing his co-owner any liberty to decide whether she will refuse or adopt them. The defendant cannot recover at common law; he cannot recover for money paid in equity, for that is a legal remedy: there is no remedy in this case for money paid. But it is said that there is a remedy in equity: a suit for a partition may be maintained in equity (1): that is a remedy which is known and recognised in a court of equity: in a suit in the Chancery Division expenditure between tenants in common would be taken into account. Reference has been made during the argument to an old form of writ; it looks to be a writ of a mandatory nature: but it has proved to be wholly unworkable in a court of common law. Therefore the rights of tenants in common went into Chancery, where a suit for a partition might be maintained. That is the only remedy which exists either at law or in equity. No such claim as that put forward in the present counter-claim can be found to have been upheld either at law or in equity. If the law were otherwise, a part-owner might be compelled to incur expense against his will: a house might be situate in a decaying borough, and it might be thought by one co-owner that it would be better not to repair it. The refusal of a tenant in common to bear any part of the cost of proper repair may be unreasonable: nevertheless, the law allows

(1) A suit for a partition might formerly have been maintained in a court of common law: Co. Litt. 163 a; 31 Hen. 8, c. 1; 32 Hen. 8, c. 32; 8 & 9 Wm. 3, c. 31; but the writ was abolished by 3 & 4 Wm. 4, c. 27, s. 36.

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him to refuse, and no action will lie against him. The judgment of Pollock, B., was right, and this appeal must be dismissed.

COTTON, L.J. I am of the same opinion. The plaintiffs have brought an action to recover rent, and the defendant by his counter-claim raises the question whether one tenant in common is liable to another for the cost of repairs.

I think that the plaintiffs are entitled to succeed in their claim for rent. It has been urged that one tenant in common cannot recover against another for rent, for either of them may enjoy the possession. But in the present case the defendant, although he himself was tenant in common, had possession of the whole of the house by virtue of a lease from his co-tenant in common. A correspondence ensued, as to the terms under which he should remain in occupation of the house. Under these circumstances, I think that the defendant must be considered as holding exclusive possession of the house upon the terms of the lease, and therefore, that he is liable for rent at the same rate as was reserved by the lease.

Then a question is raised as to repairs, and the objection is taken upon demurrer to the counter-claim. I think that it must be assumed that the house was in a bad state of repair, and that the repairs executed by the defendant were necessary. As to the claim for improvements, it has been urged that no tenant in common is entitled to execute improvements upon the property held in common, and then to charge his co-tenant in common with the cost. This seems to me the true view, and I need not further discuss the question as to improvements. As to the question of repairs, it is to be observed that when two persons are under a common obligation, one of them can recover from the other the amount expended in discharge or fulfilment of the common obligation; but that is not the position of affairs here: one tenant in common cannot charge another with the cost of repairs without a request, and in the present case it is impossible even to imply a request. No action for money paid will lie at common law; and in equity there is no remedy against a co-tenant in common, except in the case which I will presently mention. It was suggested, however, that at common law a right of contribution existed between tenants in common; and reference was

made to Fitz. Nat. Brev. 127: a form of the writ, de reparatione faciendâ, is there set out: but the language of the writ assumes that the tenants in common or joint tenants are bound to repair the mill or house; it assumes an obligation or duty towards third persons. The existence of this obligation or duty explains the writ. A similar explanation may be given of the writ of contribution mentioned in Fitz. Nat. Brev. 162. Reference was also made to Co. Litt. 200, where it is said that one tenant in common or joint tenant may have a writ de reparatione faciendâ against another; but Lord Coke is there referring to the form of writ given in Fitz. Nat. Brev. 127. I cannot assent to the suggestion that the passage in Co. Litt. 200, shews that one tenant in common may compel at his pleasure another tenant in common to contribute to the repairs of a house. I think that the passages in Fitz. Nat. Brev. 127, 162, do not present any difficulty, and are not inconsistent with the conclusion at which I have arrived. Therefore, no remedy exists for money expended in repairs by one tenant in common, so long as the property is enjoyed in common; but in a suit for a partition it is usual to have an inquiry as to those expenses of which nothing could be recovered so long as the parties enjoyed their property in common; when it is desired to put an end to that state of things, it is then necessary to consider what has been expended in improvements or repairs: the property held in common has been increased in value by the improvements and repairs; and whether the property is divided or sold by the decree of the Court, one party cannot take the increase in value, without making an allowance for what has been expended in order to obtain that increased value; in fact, the execution of the repairs and improvements is adopted and sanctioned by accepting the increased value. There is, therefore, a mode by which money expended by one tenant in common for repairs can be recovered, but the procedure is confined to suits for partition. Tenancy in common is an inconvenient kind of tenure; but if tenants in common disagree, there is always a remedy by a suit for a partition, and in this case it is the only remedy.

LINDLEY, J. I am of the same opinion. This is a case as to the mutual rights of tenants in common, and two questions have

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arisen in the action, the one as to the right of the plaintiffs to recover rent, the other as to the right of the defendant to recover for repairs which he has caused to be executed.

As to the plaintiffs' claim for rent, it appears that the defendant held under a lease, by which the plaintiffs' predecessor in title had demised certain undivided shares in a house for a term of years: after the expiration of the term the defendant held over, and the relation of landlords and tenant has never been determined. It appears to me that this is another instance of the rule, pursuant to which *Bayley* v. *Bradley* (1) was decided by the Court of Common Pleas. So far the plaintiffs are right.

The second question is, whether the plaintiffs are liable to pay a share in proportion to their interest of the cost of the repairs executed by the defendant. I will assume that the repairs in question were necessary and proper. I have looked at all the authorities cited during the argument, and I have not omitted anything likely to throw light upon the matter. Is there any obligation upon one tenant in common to contribute to expenses properly incurred by another tenant in common in respect of the property held in common? Does the law cast upon tenants in common the duty to contribute for the cost of maintaining the property in good condition? I have referred to the passages cited from Co. Litt. and Fitz. Nat. Brev.; but on looking into the matter more closely than I was able to do during the argument, I think that they do not support the contention for the defendant. Upon turning to Fitz. Nat. Brev., p. 162, where the nature of a writ of contribution is treated of, it is said: "The writ of contribution lieth where there are tenants in common, or who jointly hold a mill pro indiviso, and take the profits equally, and the mill falleth into decay, and one of them will not repair the mill; now the other shall have a writ to compel him to be contributory to the reparations." The form of the writ is then set out, from which it appears that the joint tenants "are bound to the reparation and support of the same mill." Two things strike me upon reading the form of the writ: first, it is a case of tenancy in common of a mill; secondly, all the tenants in common are bound to repair it. What obligation can there be on the owners

(1) 5 C. B. 396.

of a mill to repair it, except upon two grounds? the one ground is where they are entitled to compel persons dwelling in the neighbourhood to grind their corn at the mill; the other is where it would be a public nuisance to suffer the mill to go to decay. Neither of those grounds exists in the present case. Suppose a case where one tenant in common wishes to repair a house, and the other does not; no action at law and no suit in equity will lie to recover a contribution for the cost of the repairs, although all the tenants are necessarily thereby benefited. I have looked into the titles, "Account," "Contribution," and "Action upon the Case" in the Digests; and it is not a little singular that no remedy for any of the inconveniences attending a tenancy in common can be found except that of partition. Tenancy in common is a tenure of an inconvenient nature, and it is unfit for persons who cannot agree amongst themselves; but the evils attaching to it can be dealt with only in a suit for partition or sale, in which the rights of the various owners can be properly adjusted. It seems to me that this appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Palmer & Bull*, for *Lamb & Evett, Brighton.*

Solicitors for defendant: *Bower, Cotton, & Bower*, for *J. Stilwell, Dover.*

J. E. H.

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May 22.

[IN THE COURT OF APPEAL.]

THE QUEEN ON THE PROSECUTION OF THE JUSTICES OF DEVON *v.* THE LOCAL GOVERNMENT BOARD.

Highways and Locomotives Amendment Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 16—*Main Road, Application for Provisional Order to declare Ordinary Highway—Road disturnpiked between the* 31*st of December*, 1870, *and the passing of the Act.*

The 16th section of the Highways and Locomotives Amendment Act, 1878, provides as follows: "If it appears to a county authority that any road within their county which, within the period between the 31st of December, 1870, and the date of the passing of this Act, ceased to be a turnpike road, ought not to become a main road in pursuance of this Act, such authority shall, before the 1st of February, 1879, make an application to the Local Government Board for a provisional order declaring that such road ought not to become a main road." The section further provides that, "Subject as aforesaid, where it appears to a county authority that any road within their county, which has become a main road in pursuance of this Act, ought to cease to be a main road and become an ordinary highway, such authority may apply to the Local Government Board for a provisional order declaring that such road has ceased to be a main road and become an ordinary highway":—

Held, that a road which had ceased to be a turnpike road within the period specified by the first of the above-mentioned provisions, and had become a main road, there being no application for a provisional order before the 1st of February, 1879, was not excluded from the operation of the second of the above-mentioned provisions, and that the Local Government Board had, therefore, jurisdiction to make a provisional order declaring such road an ordinary highway upon an application made subsequently to the 1st of February, 1879.

APPEAL from the refusal of the Queen's Bench Division to grant a mandamus against the Local Government Board under the following circumstances:—

Certain roads in the county of Devon, which had originally been turnpike roads, ceased to be such in November, 1877, through the expiration of the turnpike trusts at that time. These roads became main roads under the Highways and Locomotives Amendment Act, 1878, s. 13, no application for a provisional order declaring that they ought not to become so being made under s. 16, prior to the 1st of February, 1879. In 1884 an application was made by the county authority of Devon to the Local Government Board for a provisional order under the 16th

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section, declaring that these roads had ceased to be main roads and become ordinary highways. The Local Government Board declined to entertain the application on the ground that as regards roads disturnpiked between the 31st of December, 1870, and the date of the passing of the Highways and Locomotives Amendment Act, 1878, the period allowed by s. 16 for application for provisional orders expired on the 1st of February, 1879.

The county authority thereupon applied to the Queen's Bench Division for a rule nisi for a mandamus directing the Local Government Board to entertain and determine the application. The Divisional Court having refused the application, a rule nisi had been granted on appeal by the Court of Appeal.

May 6. *Sir F. Herschell, S.G.*, and *Channell*, for the Local Government Board, shewed cause. The effect of the words "subject as aforesaid," with which the second paragraph of the 16th section of the Highways and Locomotives Amendment Act, 1878, begins, is to exclude from the operation of the subsequent words roads which became disturnpiked within the period mentioned in the first paragraph of the section. Some meaning must be given to those words, and no other meaning can be suggested than that it is intended by them to except out of the general words that follow the particular cases already provided for, and to prevent the making of a provisional order in the case of the roads that have become disturnpiked between the 31st of December, 1870, and the passing of the Act, unless the application for the order is prior to the 1st of February, 1879.

Charles, Q.C., and *Bucknill*, for the prosecutors, supported the rule. There does not appear to be any reason why roads included in the first paragraph of the 16th section should be irrevocably constituted main roads, although the circumstances connected with them may alter, while all other main roads may be converted into ordinary highways, if the justice of the case at any time requires it. The first part of the section provides only for a temporary purpose, viz., for preventing certain roads from becoming main roads at all. The latter part is a general provision applying to all roads that have become main roads, and providing for declaring them ordinary highways when and as circumstances

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may require. Whatever the real intention with which the words "subject as aforesaid" were introduced may be, the construction suggested on the part of the Local Government Board is not the natural meaning of the words. The meaning may be that, subject to the previous clause, which requires an application to be made before a certain date where upon the then existing circumstances it appears to the authority that a road disturnpiked before the passing of the Act ought never to become a main road at all, the authority may apply at any time for an order declaring that a main road should cease to be a main road and become an ordinary highway.

Cur. adv. vult.

May 22. The following judgments were delivered.

BRETT, M.R. This is an application for a mandamus to the Local Government Board to consider an application for a provisional order under s. 16 of the Highways and Locomotives Amendment Act, 1878. In this case no objection is taken on the ground that a mandamus cannot go to the Local Government Board. The Board declined to entertain the application for a provisional order thinking they had no jurisdiction under the 16th section. The matter depends entirely, as it seems to me, upon the construction of that enactment. The roads in question had been turnpike roads, but had ceased to be turnpike roads in 1877, and had become main roads under s. 13, nothing being done under the provisions of the earlier part of s. 16 to prevent their so becoming main roads. It is now desired to procure a provisional order under the later words of s. 16 declaring that these roads have ceased to be main roads and become ordinary highways. The words of that part of the section under which the application for the order was made are as follows: "Subject as aforesaid, where it appears to a county authority that any road within their county, which has become a main road in pursuance of this Act, ought to cease to be a main road and become an ordinary highway, such authority may apply to the Local Government Board for a provisional order declaring that such road has ceased to be a main road and become an ordinary highway." Putting aside the words "subject as aforesaid," this language

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would seem to give the Board jurisdiction to make the order, but it is said that the power given is so fettered and controlled by the words "subject as aforesaid" as to prevent the Local Government Board from exercising it under the circumstances of the present case. We have to consider whether that is so. The earlier portion of the Act deals with highway authorities, and the mode of payment of certain expenses, and makes various other such provisions with regard to highways and roads within the statute. Then we come to s. 13, which provides that, for the purposes of the Act and subject to its provisions, any road which has within the period between the 31st of December, 1870, and the date of the passing of the Act ceased to be a turnpike road, and any road, which being at the time of the passing of the Act a turnpike road may afterwards cease to be such, shall be deemed to be a main road. Under that section, it may be observed, no one has to do anything; without any interference by any one the roads disturnpiked become main roads. But a road such as the roads in question may be prevented from becoming a main road by the interference of the county authority and the Local Government Board under the first part of s. 16. That section provides that "if it appears to a county authority that any road within their county, which within the period between the 31st of December, 1870, and the date of the passing of the Act ceased to be a turnpike road, ought not to become a main road in pursuance of this Act, then such authority shall before the 1st of February, 1879, make an application to the Local Government Board for a provisional order declaring that such road ought not to become a main road." If there is an interference as contemplated by this part of the section with what would otherwise happen under s. 13, the road, instead of being a main road, becomes, or, perhaps I should rather say, remains an ordinary highway—for by the terms of the Act it is not in such case to become a main road. Then under s. 15 power is given to the county authority on the application of the highway authority to declare any ordinary highway a main road. Then we have to consider what is the power given by s. 16 with regard to those roads which have become main roads under ss. 13 and 15. Apart from the words "subject as aforesaid," it could not I think be suggested that the provision commencing with those words would

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not include roads which have become main roads under s. 13 in the absence of any interference under the earlier part of the 16th section. Then what is the effect of the words "subject as aforesaid"? I cannot see that they have the effect contended for on behalf of the Local Government Board, viz., of preventing the words which follow from applying to roads disturnpiked between the 31st of December, 1870, and the date of the passing of the Act, which have become main roads in the absence of any application for a provisional order before the 1st of February, 1879. Provision being made by the Act for declaring ordinary highways main roads and also a provision for declaring main roads ordinary highways, as circumstances may from time to time require, it would seem a very strange thing, in the absence apparently of any sufficient reason, to except a particular class of main roads from the latter provision and to fetter the power of the Local Government Board with regard to them in the manner suggested. The proper meaning of the words "subject as aforesaid" seems to me to be "subject to all the previous provisions of the Act with regard to the management of the roads," but in any case I do not think they can have the meaning contended for. On these grounds I think the rule for a mandamus must be made absolute.

BAGGALLAY, L.J. I am of the same opinion. The 13th section of the Act provides that roads disturnpiked between the 31st of December, 1870, and the passing of the Act and roads disturnpiked afterwards shall become main roads. The 15th section provides that any ordinary highway may be declared a main road by the county authority on the application of the highway authority. Then we come to the 16th section, the general scope of which is to provide for the conversion of main roads into ordinary highways. The section may be divided into two parts. The first applies to certain roads which, by the operation of the Act, in the absence of interference, would become main roads, and it provides that, with regard to these, an application may be made before a certain date to prevent or arrest the operation of the Act. Then the second part provides that "subject as aforesaid," where it appears to the county authority that any road within their county, which has become a main road in pursuance

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of the Act, ought to cease to be a main road, they may apply for a provisional order to that effect. But for the words "subject as aforesaid" there could be no possible question that this latter provision would apply to the present case, the words being perfectly general. Then have the words "subject as aforesaid" the effect suggested? It is suggested that they mean "in any other case than that already mentioned." But that does not seem to me to be their natural meaning. The natural meaning is "subject to all the provisions previously made." It seems to me that the effect of the construction we are adopting is sensible and reasonable, but that the effect of the other construction would be to produce this difficulty: A road which was once a main road may cease to be of the nature of a main road; a road may have been for instance a medium of communication between great towns, and may cease to be so from some other means of communication being made. It would be, as it seems to me, a very unreasonable construction to say that, if a disturnpiked road, such as those in question, which had become a main road, ceased by reason of a change of circumstances to be of the nature of a main road, there should be no power of getting it declared an ordinary highway.

BOWEN, L.J. I am of the same opinion. The language of that part of the section which follows the words "subject as aforesaid" appears to me to be sufficiently general to support the contention of the appellants unless the effect of it is cut down by those words. Whatever the previous provisions may be that are intended to be referred to by those words, I cannot find any which, giving to words their natural sense, are inconsistent with the construction contended for by the appellants. I think that to give to the words "subject as aforesaid" the meaning contended for on behalf of the Local Government Board would be to force them from their natural meaning in order to give them a meaning which, as it seems to me, they could never have been intended to bear.

Rule absolute.

Solicitors for appellants: *Cooke & Jonas, for Michelmore.*
Solicitors for Local Government Board: *Sharpe, Parkers, & Co.*

E. L.

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May 12.

[IN THE COURT OF APPEAL.]

THE GUARDIANS OF HOLBORN UNION *v.* THE GUARDIANS OF CHERTSEY UNION.

Practice—Appeal—Case stated under 12 *&* 13 *Vict. c.* 45, *s.* 11—*Poor Law—Supreme Court of Judicature Act*, 1873, *ss.* 19, 45—*Settlement by Residence—Constructive Residence of Children—Evidence.*

An appeal lies to the Court of Appeal from the decision of the Divisional Court upon a case stated under 12 & 13 Vict. c. 45, s. 11, on an appeal from an order of the justices to the quarter sessions, it not being a decision of the Divisional Court on an appeal from petty or quarter sessions within the meaning of s. 45 of the Judicature Act, 1873, and it being an "order" within s. 19 of that Act.

Upon appeal to the quarter sessions from an order of the justices adjudging that two pauper children under sixteen years of age were settled in a parish within the Holborn Union, in which their father had a settlement at the time of his death, it appeared that seven years before the order the children, then under seven years old, were on the death of their mother placed by their father in the care of K. and his wife, who resided at Chertsey within the Chertsey Union, and lived with them from that time continuously until they became chargeable. After they went to Chertsey the children were visited by their father on three occasions only, and then only for a few hours at a time, but he made a weekly payment for their maintenance which was continued to his death:—

Held, reversing the decision of the Divisional Court, that there was evidence on which the justices might find, as they must be taken to have done, that the father had never given up the intention that his children should return to him when he was in a position to receive them, and that therefore there was no ground for quashing the order of the justices.

Appeal from the decision of the Divisional Court (reported 14 Q. B. D. 289) on a case which had been stated for their opinion under 12 & 13 Vict. c. 45, s. 11, upon an appeal to the quarter sessions from an order of removal made by two justices at the Surrey Petty Sessions, adjudging that two pauper children, Amy and Wallace Kelly, were legally settled in that part of the parish of St. Andrew, Holborn, which is comprised in the appellant union. The case stated that these children were the lawful children of Thomas William Kelly and Sarah Ann his wife, who are both deceased. The mother died in February, 1877, and the father committed suicide, it is believed, in February, 1883. On the death of their mother, these children, the eldest being then aged about six years, and the other aged about four years, were

placed by their father in the care of Samuel and Ann King, who were then and now are residing at Addlestone, in the parish of Chertsey in the respondent union, and with whom the children remained continuously up to the time of making the order of removal. After the children had been so placed at Chertsey with the Kings, their father visited them only on three occasions, and then only for a few hours at a time, but he agreed to send a weekly payment for their maintenance, and this was remitted until his death, partly from money out of his own pocket and partly from money contributed by his employer. The children's father resided in the parish of St. Andrew, Holborn, in the appellant union, up to May, 1881, under such circumstances as to gain a settlement there by virtue of 39 & 40 Vict. c. 61, s. 34.

The question for the opinion of the Divisional Court was whether the children were at the time of the making of the order of removal settled in Chertsey in the respondent union, and it was agreed between the parties that a judgment in conformity with the decision of the Divisional Court might be entered on motion by either party at the Surrey Quarter Sessions next or next but one after such decision should have been given.

The Divisional Court were of opinion that there was no evidence to justify any other conclusion than that the residence of the children with the Kings was in fact their permanent home; that there was no evidence that their father ever intended they should return to live with him; and that consequently they acquired a settlement by residence in Chertsey, and that that was the conclusion the justices should have come to.

The appellants (the guardians of the Holborn Union) appealed to this Court, notwithstanding that the Divisional Court refused to give leave to appeal.

Charles, Q.C., and *Poland*, for the respondents (the guardians of the Chertsey Union). There is a preliminary objection. No appeal lies to this Court, as leave to appeal was refused. The case comes by way of appeal from the justices in petty sessions on a case stated under Baines's Act (12 & 13 Vict. c. 45), s. 11, for the opinion of the Divisional Court. Then s. 45 of the Judicature Act, 1873, provides for all appeals from the petty or

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quarter sessions, and makes the decision of the Divisional Court on such appeals final, unless special leave to appeal be given. There is no decision on any case exactly in point, but *Hinton* v. *Swindon New Town Local Board* (1) is somewhat similar. That was on s. 269, sub-s. 7, of the Public Health Act, 1875 (38 & 39 Vict. c. 55) which, like 12 & 13 Vict. c. 45, s. 11, enables the court of quarter sessions "to state the facts specially for the determination of a superior court," and there it was held that where the Divisional Court had given a decision on a special case stated by the court of quarter sessions under that section, no appeal would lie from it without leave.

[*Bosanquet, Q.C.*, for the appellants, referred to *Corporation of Peterborough* v. *Overseers of Wilsthorpe.* (2)]

It must be admitted that it was held there that an appeal will lie from the decision of the Queen's Bench Division, upon a case stated under 12 & 13 Vict. c. 45, s. 11, but that was in an appeal against a poor-rate, and leave to appeal was expressly given, besides the decision was only that there was an adjudication by the Divisional Court, which was an order within s. 19 of the Judicature Act, 1873, and no allusion was made by either the Court or counsel to s. 45 of that Act, or any point raised as to there being therefore no appeal. The present, however, was an appeal from petty sessions in a form of special case to the superior court, and so is within that 45th section, which makes the determination of such appeal by the Divisional Court final. Instead of going from the petty to the quarter sessions, the parties agree under Baines's Act to go direct to the Queen's Bench Division, whose decision is made binding upon them. The case then comes within s. 45 of the Judicature Act, 1873, and from that decision there is no appeal without leave. In *Reg.* v. *Savin* (3) and *Overseers of Walsall* v. *London and North Western Ry. Co.* (4), the Queen's Bench Division was acting in exercise of its original common law jurisdiction, and besides, in the last mentioned case leave to appeal was given.

Bosanquet, Q.C. (*R. Cunningham Glen* with him), for the appellants. This is not an appeal brought from petty sessions to

(1) 42 L. T. (N.S.) 614.
(2) 12 Q. B. D. 1.
(3) 6 Q. B. D. 309.
(4) 4 App. Cas. 30.

the Queen's Bench Division. It is a case stated for the opinion of that Court in a proceeding from the petty sessions to the quarter sessions. It does not therefore come within s. 45 of the Judicature Act, 1873. Sect. 11 of Baines's Act does not give an appeal from the justices in session to the superior court, but only power to the parties to state a case for the opinion of such Court, and to agree that judgment in conformity with it shall be entered in the court of quarter sessions.

[He was then stopped by the Court.]

BRETT, M.R. I do not pretend to understand s. 45 of the Judicature Act, 1873, but I will keep to the words of it. This is a case which was stated for the opinion of the Divisional Court under s. 11 of 12 & 13 Vict. c. 45. There was an order of the justices in petty sessions and an appeal from that order to the quarter sessions, which is still existing, therefore it is impossible to say that it came before the Divisional Court on appeal from the petty sessions. Whilst the order of the justices was standing for appeal to the quarter sessions the power was exercised, which is given by 12 & 13 Vict. c. 45, s. 11, to state a case for the opinion of the Divisional Court, but the case was not afterwards to go back to the justices in petty sessions to rectify their order, but it was to go to the quarter sessions, who had not yet heard the appeal, for them to enter judgment accordingly, so that the judgment might be theirs. The result, therefore, is, that it is not an appeal from petty sessions to the Divisional Court, because it is standing as an appeal to the quarter sessions, nor is it an appeal from the quarter sessions, because the quarter sessions have not given any judgment. There is, however, an order of the Divisional Court within the words of the judgment I delivered in *Corporation of Peterborough* v. *Overseers of Wilsthorpe*. (1) The parties are allowed by the statute to state a case for the opinion of the Divisional Court, which is to bind the parties, and it is then to be sent down for judgment to be entered at the quarter sessions in conformity with that opinion. That brings it within the decision of *Overseers of Walsall* v. *London and North Western Ry. Co.* (2) There is an adjudication which is binding on

(1) 12 Q. B. D. 1. (2) 4 App. Cas. 30.

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the parties, but which, though not what is technically called a judgment, is an order within s. 19 of the Judicature Act, 1873. The question then is, whether it is only an order within that section, or whether it is also an order within s. 45, from which there is no appeal? The 45th section states that the decision of the Divisional Court shall be final from "all appeals from petty sessions or from quarter sessions." I have already shewn that this is not such an appeal, it is neither one nor the other. Therefore the order is an order within s. 19, and not within s. 45, consequently an appeal lies from it to this Court.

BAGGALLAY, L.J. I am of the same opinion. The 45th section of the Judicature Act, 1873, provides that all appeals from petty sessions or quarter sessions are to be brought before the Divisional Court. Then, if we go back to the Act of 12 & 13 Vict. c. 45, we find that when an appeal has been brought from the petty to the quarter sessions, the hearing of it by the quarter sessions may be intercepted by a case stated for the opinion of one of the superior Courts, and if judgment be given by that Court it may be entered at the sessions next or next but one after it has been given, and it then becomes an order of the quarter sessions. I take the precise words of that section, and read it with those of the 19th section, and unless this case comes within the words of the 45th section, which to my mind it does not in the present case, then the 19th section is clear, and applies.

BOWEN, L.J. I agree, although I cannot say with confidence.

The case was then heard on the merits.

Bosanquet, Q.C., and *R. Cunningham Glen*, for the appellants, contended that the children being unemancipated gained no settlement of their own, but took the settlement of their father, and that the Divisional Court were wrong in the inference of fact they drew, that the father had so abandoned his children as to make their residence at Chertsey their permanent home. They also argued that 11 & 12 Vict. c. 111, s. 1, applied, and prevented the children from acquiring the settlement by residence, and they cited 9 & 10 Vict. c. 66, s. 1; 39 & 40 Vict. c. 61, s 34; *Reg.* v.

Leeds Union (1); *Reg.* v. *St. Mary, Islington* (2); *Reg.* v. *St. Olave's* (3); *Reg.* v. *Overseers of Much Hoole* (4); *Reg.* v. *Overseers of St. Mary Arches (Exeter)* (5); and *Guardians of Salford* v. *Overseers of Manchester.* (6)

A. Charles, Q.C. (*Poland*, with him), for the respondents, contended that the children had acquired a settlement by residence at Chertsey, and that the right inference of fact to be drawn was that their father intended that their permanent home should be there with the Kings; but he admitted that he could not contend that there was no evidence to justify the justices in petty sessions in coming to any other conclusion than that the residence with the Kings was to be the permanent home of the children. He did not argue the point made by the appellants on 11 & 12 Vict. c. 111, as from the view of the facts taken by the Court of Appeal it became unnecessary for him to do so.

THE COURT (Brett, M.R., and Baggallay and Bowen, L.JJ.), stated that the justices when they made the order of removal must have been satisfied that Kelly, when he placed his children with the Kings, did not intend that they were never to return to him, and that to overrule the decision of the justices the Court must hold that there was no evidence to justify the justices in coming to that conclusion. In this respect the Court of Appeal differed from the Divisional Court, and therefore reversed their decision without giving any opinion on 11 & 12 Vict. c. 111, or on any other point of law in the case.

Appeal allowed.

Solicitor for appellants: *W. H. Francis, for Paine & Brettell, Chertsey.*

Solicitor for respondents: *Rexworthy.*

(1) 4 Q. B. D. 323.
(2) Law Rep. 5 Q. B. 445.
(3) Law Rep. 9 Q. B. 38.
(4) 21 L. J. (M.C.) 1.
(5) 31 L. J. (M.C.) 77.
(6) 10 Q. B. D. 172.

W. P.

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April 17.

MOGG *v.* CLARK.

Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 6—*Vestryman—Qualification of—Rating—Occupation.*

By 18 & 19 Vict. c. 120 (Metropolis Local Management Act, 1855), s. 6, "the vestry elected under this Act in any parish shall consist of persons rated or assessed to the relief of the poor upon a rental of not less than 40*l.* per annum; and no person shall be capable of acting or being elected as one of such vestry for any parish, unless he be the occupier of a house, lands, tenements, or hereditaments in such parish, and be rated or assessed as aforesaid upon such rental as aforesaid within such parish":—

Held, that to be qualified as a vestryman under the Act a person must be the occupier of real property in the parish and be himself rated or assessed in respect of such occupation to the required amount.

By the statement of claim the plaintiff alleged that on the 24th of June and the 30th of September, 1884, the defendant acted as a member of the vestry of the parish of St. Leonard, Shoreditch, in the county of Middlesex, without being qualified by rating and occupation as was required by the Metropolis Management Act, 1885 (18 & 19 Vict. c. 120), and the plaintiff claimed 100*l.*

The defence was a denial, and the reply joined issue thereon.

The cause was tried on the 14th of April, 1885, before Lopes, J., without a jury. It was admitted that the defendant had acted by voting as a vestryman. The question in dispute was as to his qualification.

Bompas, Q.C., and *Bucknill*, for the plaintiff.

Winch, for the defendant.

The facts and arguments appear from the judgment.

Cur. adv. vult.

April 17. Lopes, J. This action was brought by the plaintiff against the defendant to recover penalties because the defendant had on two occasions acted as a member of the vestry of Shoreditch without being qualified by rating and occupation as required by the Metropolis Management Act, 1885 (18 & 19 Vict. c. 120).

Sect. 6 of that Act fixes the qualification of vestrymen.

They must be persons rated or assessed to the relief of the poor upon a rental of not less than 40*l.* per annum, and no person is to be capable of acting or being elected as one of the vestry for any parish unless he be the occupier of a house, lands, tenements, or hereditaments in such parish, and be rated or assessed to the relief of the poor upon a rental of not less than 40*l.* within the parish. 25*l.* is to be substituted for 40*l.* in certain cases, and there is a proviso with regard to a joint occupation and joint rating, which is immaterial in this case.

Sect. 54 enacts that any person who acts as a member of any such vestry without being qualified by rating and occupation, as required by the Act, shall for any such offence be liable to a penalty of 50*l.*

The defendant occupied a garden which was jointly rated with a house let to another man at 18*l.*

The defendant occupied nothing else within the parish; he was the owner of several small tenements, which were rented by tenants whose names appeared in the rate-book as occupiers; the defendant had agreed with the overseers under s. 3 of the Act, 32 & 33 Vict. c. 41, to be liable for the poor-rates assessed in respect of these tenements. The aggregate rental of these tenements was 68*l.*, and so appeared in the rate-book.

This case depends on the construction of s. 6 of 18 & 19 Vict. c. 120.

It was contended by the defendant that the occupation of any rateable property within the parish, however small its rateable value, was sufficient to satisfy the requirements as to occupation, and he further contended that he was rated in the required amount, because, as owner, he had agreed with the overseers to be liable for the poor-rate assessed in respect of the aforesaid small tenements. In fact he contended that a liability to pay poor-rates under an agreement with the overseers was equivalent to being himself rated.

It is material to consider the objects the legislature had in view when it imposed the qualification contained in s. 6 on vestrymen. I presume occupation in the parish was required because it was expedient that vestrymen should be on the spot, and be conversant with the locality, and rateability to a certain amount

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in order that they might substantially contribute towards, and have a stake in, the funds which they had to administer. It is also material to bear in mind that occupation of real property in the parish is necessary to render a person liable to be rated to the relief of the poor in that parish. Bearing these matters in mind I think the true construction of s. 6 is that no person is to be qualified as a vestryman unless he is an occupier of real property in the parish, and is rated or assessed in respect of such occupation in the specified amount,—he must be the occupier of real property to the specified amount. Nobody was liable to be rated unless he was an occupier, and this may be the reason why the words "as such occupier," were not inserted, the legislature regarding such words as surplusage. I am inclined, however, to think the first "as aforesaid" does refer to the words "occupier of a house, lands, tenements, and hereditaments," which almost immediately precede. But, whether this be so or not, I am clear a person to be qualified must be rated or assessed to the required amount in respect of his occupation. Even if my construction of s. 6 is not correct it seems impossible to contend successfully that the defendant was rated in his required amount. He could not be unless his agreement with the overseers to pay the rates for his tenants was equivalent to being rated himself. This cannot be. The persons rated were his tenants, the occupiers, and not the defendant. I am of opinion, therefore, the defendant was not qualified. There will be judgment for the plaintiff for two penalties of 100*l.*, with costs.

Solicitors for plaintiff: *Bramall & White.*
Solicitors for defendant: *J. R. Smith & Son.*

J. R.

Applied. BIGGIN & CO., LTD. *v.* PERMANITE, LTD. [1951] 2 All E.R. 191.

[IN THE COURT OF APPEAL.]

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April 28.

GRÉBERT-BORGNIS *v.* J. & W. NUGENT.

Damages—Measure of Damages—Breach of Contract—Sale of Goods to fulfil a Contract by Vendee.

The defendants contracted with the plaintiff to deliver goods to him of a particular shape and description at certain prices and by instalments at different times. When the contract was made the defendants knew that, except as to price, it corresponded with and was substantially the same as a contract which the plaintiff had entered into with a French customer of his, and that it was made in order to enable the plaintiff to fulfil such last-mentioned contract. The defendants broke their contract, and there being no market for goods of the description contracted for, the plaintiff's customer recovered damages against him in the French court to the amount of 28*l.* :—

Held, in an action against the defendants for their breach of contract, that the plaintiff was not only entitled to recover as damages the amount of profit he would have made had he been able to fulfil his contract with his customer, but also damages in respect of his liability to such customer, and that in estimating such last-mentioned damages the 28*l.* which the French Court had given might be treated as not an unreasonable one at which such damages might be assessed.

The case of *Elbinger Actien-Gesellschafft* v. *Armstrong* (Law Rep. 9 Q. B. 473) approved of.

ACTION for damages for breach of contract which was tried before Denman, J., without a jury in last Michaelmas sittings. It appeared at the trial that the plaintiff, who is a fur merchant carrying on business as such at Paris, came over to this country in the latter part of January, 1883, and had an interview there with the senior partner in the firm of the defendants, manufacturers of sheep skin rugs at Deptford. At that interview the plaintiff made inquiry about the price of sheep skins, and informed the defendant that he should want them in order to supply a customer of his at Paris in fulfilment of a contract he was then making with him, and that as soon as he, the plaintiff, had seen the customer he would let the defendants know the quantities he should want as well as the times at which they were to be delivered, for, as he said, he should not want them all at once. The plaintiff after returning to Paris wrote to the defendants, in which, referring to the interview that had so taken place between him and the senior defendant, he specified the sheep

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skins he should want, and a correspondence took place between them which resulted in a contract on the 4th of February, 1883, by which the defendants contracted to deliver to the plaintiff 243 black and white sheep skins of particular lengths and sizes at specified prices and at certain definite periods. On the same 4th of February, 1883, the plaintiff contracted with Messrs. Seppe & Co. of Paris, to sell and deliver to them skins of the description the defendants had contracted to supply, and at periods corresponding with those at which the defendants were to deliver to the plaintiff, but at a profit to the plaintiff of five francs per skin over and above the price he had to pay the defendants. The defendants delivered only forty-two skins, which the plaintiff paid for, and the defendants broke their contract to deliver the remainder. There was no market price for such skins, and skins of the description contracted for could not be procured anywhere unless ordered some time in advance. In consequence of the defendants' breach of contract the plaintiff failed to supply Messrs. Seppe & Co. with the skins he contracted to deliver, and was sued by Messrs. Seppe & Co. for damages in the Tribunal of Commerce at Paris, where judgment was given against him for 700 francs (28*l.* English money), besides costs.

Denman, J., having found as a fact the contract and breach, and that the defendants knew that the contract was to enable the Plaintiff to fulfil his contract with Messrs. Seppe as above stated, and that the profit which the plaintiff lost by not fulfilling his contract with Messrs. Seppe was 34*l.*, held that the plaintiff was entitled to recover not only 34*l.*, but also 28*l.*, which, on the principle laid down in *Elbinger Actien-Gesellschafft* v. *Armstrong* (1) he assessed as a reasonable sum by way of damage for the breach of contract by the defendants. The learned Judge therefore gave judgment for the plaintiff for 62*l.*

The defendants appealed.

Finlay, *Q.C.*, and *Ralf Griffin*, for the defendants. The verdict given by the learned judge was wrong in fact. Secondly, the damages ought to be reduced by 28*l.* As to the damages, no objection is made to the plaintiff being entitled to recover for

(1) Law Rep. 9 Q. B. 473.

his loss of profit, or to the sum of 34*l.* which was given in respect of such loss, but objection is made to the 28*l.*, the sum recovered against the plaintiff in the French court by Messrs. Seppe as damages for his not fulfilling his contract with them. The defendants are not liable for the sum the plaintiff had to pay Messrs. Seppe, and the learned judge was therefore wrong in awarding him that sum. Admitting that the defendants knew at the time they contracted with the plaintiff that the plaintiff had contracted or was about to contract for the supply of skins to a customer of his, and that the contract with the defendants was made for the purpose of fulfilling such contract with his customer, that would only bring it within the case of *Borries* v. *Hutchinson* (1) as distinguished from *Thol* v. *Henderson* (2), and entitle the plaintiff to damages for loss of profit on his sale to Messrs. Seppe. The learned judge in giving the 28*l.* said that he acted on the case of *Elbinger Actien-Gesellschafft* v. *Armstrong* (3), but that case does not apply; moreover in that case the plaintiff only recovered compensation for not having been able to fulfil the sub-contract he had made with the Russian company, and the Court never held that he was entitled to recover the penalties he paid to that company. As said by Cotton, L.J., in *Hydraulic Engineering Co.* v. *McHaffie* (4), "in *Elbinger Actien-Gesellschafft* v. *Armstrong* (3) it appears to have been considered that penalties due under a contract to which the contract sued on was subsidiary could not as such be recovered; that was because penalties are not the natural consequence of a breach." [They also referred to *O'Hanllan* v. *Great Western Ry. Co.* (5) and *Williams* v. *Reynolds.* (6)]

Horne Payne, and *George S. Bower*, for the plaintiff. The defendants knew that the contract with the plaintiff was to enable him to fulfil a sub-contract with his customer. They knew more than that the sale to the plaintiff was for "resale." They knew that the goods were to be delivered at particular periods in order to fulfil the sub-contract, and therefore they must have known that the plaintiff would incur a liability to his customer if by

(1) 18 C. B. (N.S.) 445; 34 L. J. (C.P.) 169.
(2) 8 Q. B. D. 457.
(3) Law Rep. 9 Q. B. 473.
(4) 4 Q. B. D. 670, at p. 677.
(5) 6 Best & S. 484.
(6) 6 Best & S. 495.

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reason of the defendants' breach of contract he could not fulfil his sub-contract. Then there being no market for these particular skins the defendants must have known that the plaintiff would have to pay damages. *Hinde* v. *Liddell* (1) shews that the plaintiff might recover the value of the goods contracted for at the time of the breach. There he was allowed to recover the difference between the contract price and what he had to pay for goods of a superior description which he got by way of substitute, there being no market for goods of the description contracted for.

BRETT, M.R. I am of opinion that the judgment of my Brother Denman should be supported. The question, first of all, is, what are to be taken to be the facts of the case? I think my Brother Denman was justified in drawing the conclusion he did from the evidence, namely, that the plaintiff came over and saw the defendants in this country, and informed them that he was about to complete or had completed a contract with a French customer in Paris, and that he wished the defendants to supply skins which would enable him to fulfil the contract with his Paris customer; and that he would send them the particulars for that purpose. Therefore, when the plaintiff sent over to the defendants the order to manufacture and deliver skins of different specialities as to quality and shape and other matters, at different prices, and to be delivered in lots at different times, it corresponded in truth with a contract which at that time was then in contemplation if not complete in fact with the French customer, and the defendants really knew as matter of business and for all practical purposes that the contract which the plaintiff had made with the French customer was substantially the same which he was making with the defendants, though of course with this difference, that, as a matter of business, the plaintiff would be selling to the Frenchman at a price greater than that which he was giving to the defendants. That is the extent of the knowledge which the defendants had of the contract by the plaintiff with his French customer. It is not the case of a merchant ordering goods from the manufacturer here to be sent and resold abroad, which of itself would tell the manufacturer that the order was for goods to be resold at a profit.

(1) Law Rep. 10 Q. B. 265.

It is more than that. It is, that he, the plaintiff, was under a specific and particular contract with a particular person, and that the skins were to enable the plaintiff to fulfil that contract.

Now, the defendants broke their contract with the plaintiff, and thereby disabled the plaintiff from fulfilling his contract, beyond a certain amount, with the French customer. Now, what were the damages to which, under those circumstances, the plaintiff was entitled? There was no market for these goods. If there had been a market for them, what the plaintiff would have been bound to do would have been to go into the market and buy the goods and so supplied his French customer; and if the market price was above the contract price he would get the difference from the defendants. There was no market, therefore the first head of damage is perfectly clear; he lost the profit of 5 francs per skin which he otherwise would have made. This has not been disputed by the learned counsel on behalf of the defendants, and, therefore, the plaintiff's right to the 34*l.* is practically admitted.

But then the plaintiff says, I have in fact not only lost the profit which I should have made, but I have been made to pay 28*l.* more on account of my breach of contract with my French customer. Then comes the question, can he recover from the defendants that sum or any loss in respect of damages which he has had to pay to his French customer?

Now, the cases which have been cited are supposed to be cases which carry out the principle laid down in *Hadley* v. *Baxendale*. (1) And what I take to be result of them is this: Where a plaintiff under such circumstances as the present is seeking to recover for some liability which he has incurred under a contract made by him with a third person, he must shew that the defendant, at the time he made his contract with the plaintiff, knew of that contract, and contracted on the terms of being liable if he forced the plaintiff to a breach of that contract. If such sub-contract was not made known to him at all the defendant cannot be made liable for what the plaintiff has had to pay under it. If there be no market for the goods, then the sub-contract by the plaintiff, although not brought to the knowledge of the defendant,

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.

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the original vendor, may be put in evidence in order to shew what was the real value of the goods, and so enable the plaintiff to recover the difference between the contract price and the real value.

But where the sub-contract was fully made known to him in all its terms, in my opinion the defendant would be liable; and the proper inference, and one which the jury might infer, would be that he had contracted with the plaintiff upon the terms that if he broke his contract he should be liable for all the consequences of a failure by the plaintiff to perform his sub-contract.

Still, however, it seems to me, according to what has been decided, that the original vendor, in such a case as this, is only liable, in the case of a breach of contract, for the natural consequences of so much of the sub-contract as was made known to him. If he were told, for instance, that the contract was that if I do not supply my purchaser with the goods which I am ordering from him, my vendor, I shall have to pay my purchaser 4*l.* a ton for every ton which I do not deliver, then, if there be a breach of the contract, the original vendor would have to pay the 4*l.* a ton. But supposing there was in the sub-contract between myself and my purchaser not only a stipulation that I should pay 4*l.* a ton, but, besides that, I should be liable to a penalty of 5*l.* a day, although that is in the sub-contract, yet if that part of it was not made known to the original vendor, then for that reason and because it is not a natural consequence of his bargain, he would not be liable to pay the penalty of 5*l.* a day. It seems to me that the cases establish that the original vendor is to be liable to so much of the sub-contract as was made known to him, but only to that extent.

Now *Borries* v. *Hutchinson* (1) was a peculiar case. It was tried before Willes, L.J., and under the old system. There was a Russian contract between the plaintiff and a third person, but the whole of the terms of it were not made known to the defendant. The Court came to the conclusion, as an inference of fact, that so much was made known to him as that it was a contract to deliver goods in Russia, and that there was a breach of contract by the defendant. He, the defendant, would have been

(1) 18 C. B. (N.S.) 445; 34 L. J. (C.P.) 169.

bound to know that there would be a loss of profit on the part of the plaintiff, if the contract was not followed out, and, therefore, the amount of profit which he would have made was paid into court. Then came the question of whether on the two other claims which the plaintiff made he could recover? Now, one of those claims was in respect of increased freight and insurance which he had to pay for the sending of the goods to Russia. Everybody who knows the Russian trade knows that the freight and insurance increase as the year goes on, and that winter freight to Russia is very high. Therefore the moment it was known that there was a contract to deliver goods in Russia, that gave notice to the defendant that if he did not deliver at the times specified, which were, I suppose, summer times, and if he delivered late the natural consequence would be the plaintiff would have to pay increased freight and insurance. The Court therefore held that the defendant must pay the increased freight and insurance. Then came the question of penalties. The particulars of the penalties were not made known to the defendant, and he was held not liable for these. That case seems to me to be within the rule I endeavoured to state at first, that the defendant was only made liable in respect of the natural consequences of a breach of so much of the contract as was made known to him.

Now, in the case of *Elbinger Actien-Gesellschafft* v. *Armstrong* (1) there was a contract with a third person which was to a great extent made known to the defendant. It was clear, from what was known, that if the defendant broke his contract the plaintiff would be bound to pay damages to the person with whom he made the sub-contract. The only peculiarity of the case was the mode in which the jury were allowed to estimate those damages. The exact amount of the penalties was not made known to the defendant, but only that if he broke his contract the plaintiff would have to pay damages. Therefore the Court said, the defendant must pay damages; then how were they to be ascertained? The Court said, you must not take the amount of penalties which the plaintiff has been made to pay in Russia, and say the law thereupon determines that is the amount of damages, but the Court allowed the jury to look to the amount of penalties

(1) Law Rep. 9 Q. B. 473.

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as a circumstance to regulate them in finding what it was reasonable the defendant should pay to the plaintiff.

That case seems to me to be exactly within the same rule as *Borries* v. *Hutchinson* (1), only the facts were different; and therefore the application of the rule was different. Now apply that to the present case. Here the defendants knew that there was a sub-contract with a person in France, and they knew the terms of such contract to the extent that there were to be deliveries at different times of particular sheep skins, got up in a particular way. What must they then have known, as men of business, but that if the plaintiff did not supply the skins which he had engaged upon such sub-contract to supply to his customer in France, the plaintiff would have to pay damages to that customer. How then was Denman, J., to estimate the damages? He himself acted upon the rule which to my mind is expressly laid down in *Elbinger Actien-Gesellschafft* v. *Armstrong*. (2) He said he must not take the damages given by the French Court and say, as matter of law, those were the exact figures he must give; but he said that he came to the conclusion that in all probability the French Court did that which was reasonable, and that, therefore, he should take that into account, and as matter of fact find that sum as the reasonable amount of damages. I think he was entitled to do that, and that so far from going against any case, he has followed that of *Elbinger Actien-Gesellschafft* v. *Armstrong*. (2)

Under these circumstances I think the judgment of the learned judge in the Court below was right.

BAGGALLAY, L.J. I am of the same opinion; and I have nothing to add to what the Master of the Rolls has stated.

BOWEN, L.J. I am also of the same opinion, and I shall only add a few words. The question really is, what is the true measure of damages in this case? A person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract. That is the principle really at the bottom of *Hadley* v. *Baxendale*. (3)

(1) 18 C. B. (N.S.) 445; 34 L. J. (C.P.) 169.

(2) Law Rep. 9 Q. B. 473.

(3) 9 Ex. 341; 23 L. J. (Ex.) 179.

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Now, how much of the damages claimed may reasonably be supposed to have been in the contemplation of the parties at the time of making the contract depends in every case upon how much of the real situation of the parties was so disclosed by the purchaser to the vendor at the time the contract was made, as to render it a fair inference of fact that damages of that class were intended to be recouped if they were suffered. In the particular instance with which we have to deal, the vendors knew that the vendee had a sub-contract which he had made in France, and that the contract with them was made for the purpose of supplying the goods under the sub-contract, and they knew also that there was no market at which the goods could be bought in case they failed to fulfil their contract. The result was that the vendors knew at the time when the vendee was purchasing that if the contract which he made with them was fulfilled there would be a profit, but that if it was broken there would be a loss; and further, that there being no market into which either the vendee or his sub-purchaser could go in order to make good the skins not supplied, the sub-purchaser would be in considerable difficulty, so that the natural inference from such a transaction could only be that the vendee would be obliged in some way to make good the loss which the sub-purchaser had suffered. Now it was admitted that the learned judge might give the loss of profit, because it was obvious that the parties both knew at the time of making the contract that if broken there would be such loss of profit. It seems to me, also, that in a case of this sort, where there was no market into which the parties could go and buy against the broken contract, the natural result which must have been contemplated at the time the original contract was made must have been that there would be a liability by the purchaser to his sub-purchaser. It was for the judge to do the best he could with regard to the amount which he might assess in respect of this. The limit of the liability must clearly be what the purchaser had to pay. But it does not follow that was necessarily what he would be entitled to charge against his vendors. The learned judge would have to give something substantial not exceeding the amount which had to be paid by the purchaser to his sub-purchaser. He thought the sum of 28*l.*, which was the outside that was paid, was not too much. In treating the case

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Bowen, L.J.

in that way he treated it exactly as Lord Blackburn, then Blackburn, J., treated it in *Elbinger Actien-Gesellschafft* v. *Armstrong* (1), where he says, "If the judge had told the jury expressly that the penalties as such could not be recovered, but that the plaintiffs were entitled to such damage as in their opinion would be fair compensation for the loss which would naturally arise from the delay, including therein the probable liability of the plaintiffs to damages by reason of the breach through the defendant's default of that contract, to which, as both parties knew, the defendant's contract with the plaintiffs was subsidiary, the direction would not at all events have been too unfavourable to the defendant." What proves to my mind that Lord Blackburn thought it must be dealt with as a substantial matter of business, but one on which there could be no exact measure of damages beyond the extent to which he does lay down the principle, follows from the next passage in his judgment; because he there justifies giving the penalties of 100*l.* 13*s.* on the ground that it was not a heavy percentage considering the amount of the contract, and so he reasons out the measure of damages with regard to the liability of the vendee to his sub-purchaser. Now here, looking to the circumstances, can it be said that 28*l.* was an unreasonable sum to give when it was quite certain there would be some liability as a matter of business and the plaintiff actually did suffer 28*l.* damage?

This case, therefore, to my mind must be decided by the case of *Elbinger Actien-Gesellschafft* v. *Armstrong*. (2)

As to *Borries* v. *Hutchinson* (3), I will say only that I am not convinced that it is altogether reconcilable either with our present decision or with *Elbinger Actien-Gesellschafft* v. *Armstrong*. (2) It is enough to say that either it is reconcilable with *Elbinger Actien-Gesellschafft* v. *Armstrong* (2), or if not, that the latter case ought to prevail, since I think that the principles which are laid down in it are very clear and sound.

Judgment affirmed.

Solicitor for plaintiff: *Adolphus Selim.*
Solicitor for defendants: *A. Poland.*

(1) Law Rep. 9 Q. B. 473, at p. 479.
(2) Law Rep. 9 Q. B. 473.
(3) 18 C. B. (N.S.) 445; 34 L. J. (C.P.) 169.

W. P.

THE QUEEN (ON THE PROSECUTION OF THE GUARDIANS OF THE POOR OF THE EDMONTON UNION) *v.* THE GUARDIANS OF THE POOR OF ST. MARY, ISLINGTON.

1885
May 5.

IN RE ALICE DAVIS.

Poor Law—Removal—Derivative Settlement—Paupers above Sixteen—39 & 40 *Vict. c.* 61 (*Divided Parishes Act*, 1876), *s.* 35.

Since 39 & 40 Vict. c. 61 (Divided Parishes Act, 1876), s. 35, enacting that "no person shall be deemed to have derived a settlement from any other person, . . . except . . . in the case of a child under the age of sixteen, which child shall take the settlement of its father . . . up to that age and shall retain the settlement so taken until it shall acquire another," paupers who are above the age of sixteen at the time of the inquiry as to their settlement cannot take the settlement of their father.

ON appeal against an order made by two justices bearing date the 16th day of February, A.D. 1884, for the removal of Alice Davis from the parish of St. Mary, Islington, in the county of Middlesex, to the parish of Enfield in the same county and in the Edmonton union, the court of quarter sessions quashed the order with costs subject to the following

CASE.

Alice Davis, the pauper, was born on the 27th day of June, 1855, in the parish of Enfield, in the Edmonton union, and was the legitimate daughter of Richard Davis and Jane his wife. She never acquired any settlement by any act of her own.

Richard Davis, the father of the pauper, was born on the 14th day of November, 1830, in the parish of St. Alphage in the city of Canterbury. He acquired no other settlement.

On the 16th day of February last the said order of removal was obtained on the ground that the pauper was born in the Edmonton union.

It was contended on behalf of the respondents that the words "no person" commencing the 35th section, 39 & 40 Vict. c. 61, were, by the context, limited to a pauper whose settlement is under consideration, and that thus the present pauper, having arrived at the age of twenty-eight years at the time when her settlement was being inquired into, was to be deemed not to have

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derived a settlement from her father, but to be settled in the parish in which she was born. It was further contended that by force of the same section the birth settlement of the father was not a settlement which the daughter could derive.

It was contended on behalf of the appellants that, on the true construction of the section, this pauper was settled in the parish in which her father was born.

The Court were of opinion that the contention of the appellants was right, and quashed the order.

The question for the opinion of the Queen's Bench Division was whether the pauper was settled in the place of her birth or in the place of her father's birth.

If the Court should be of opinion that the pauper was settled in the place of her birth then the order of removal was to stand confirmed, and the order of sessions quashing the same be quashed, but if the Court should be of opinion that the pauper was settled in the place of her father's birth then the order of sessions was to be confirmed.

Tickell (*Besley*, with him), for the guardians of St. Mary, Islington. The question is whether the case comes within the declaratory part of 39 & 40 Vict. c. 61, s. 35, "No person shall be deemed to have derived a settlement from any other person," or within the exception "except in the case of a child under the age of sixteen." Both parts of the section have been held to be retrospective. The decisions on it cannot be reconciled, but *Reg.* v. *Guardians of Bridgnorth* (1) has overruled the previous cases and established the true construction of the section, into which after the words "no person" such words as "whose settlement is being inquired into" must be inserted. If that person is at the time of the inquiry above sixteen he is settled at the place of his birth, and if under sixteen he takes his father's settlement and retains it until the pauper acquires another. That is the only construction which will carry out the intention of the legislature to abolish derivative settlements. In *Reg.* v. *Guardians of Bridgnorth* (1), Brett, J., referred to the exceptions in s. 35, and said "a child over sixteen . . . is not excepted, and this section must

(1) 11 Q. B. D. 314.

be read that in the case of a question as to the removal of a child under sixteen such 'child shall take the settlement of its father or its widowed mother as the case may be'" (1); and Cotton, L.J., said that the exception was pointed, in his opinion, "only to those who can properly be called children at the time when the question arises as to their removal." (2) This pauper, who was a woman of twenty-eight years at the time of removal, cannot be treated as a "child under the age of sixteen" within the meaning of s. 35. The order of sessions quashing the order of removal was wrong.

Poland, for the Edmonton Union. The order of quarter sessions was right. This pauper was settled in the parish where her father was born, and not in the parish where she was born. Further, the case is concluded by authority.

In 1855 when the pauper was born she took her father's settlement by birth; for it is clear law that children at birth take the father's settlement. The Divided Parishes Act, 1876, s. 35, has not deprived her of that settlement. Under the former law the question of emancipation often arose in settlement cases. Even up to old age a pauper, if unemancipated, continued to take the father's settlement. There was often much difficulty in ascertaining whether the pauper was emancipated or not. The Act was intended to lessen that difficulty, and to abolish derivative settlements after the age of sixteen. But children under sixteen are still to take the father's settlement until they acquire another. Whatever settlement the father gets by renting a tenement or otherwise his child takes until sixteen, and retains the settlement it has at sixteen until it acquires another. This pauper, as a child under the age of sixteen, took its father's settlement, and "shall retain the settlement so taken until it shall acquire another." No other has since been acquired. To displace that settlement the respondents must rely on the latter part of s. 35, providing that if it cannot be shewn what settlement such child derived from the parent, without inquiring into the derivative settlement of such parent, such child shall be deemed to be settled in the parish in which she was born. But that proviso does not apply, because the settlement can in this case be ascertained

(1) 11 Q. B. D. at p. 321. (2) At p. 324.

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without such inquiry. In *Guardians of Hereford Union* v. *Guardians of Warwick Union* (1), a pauper born in 1840 in the Hereford union, had never acquired a settlement in her own right. Her father was born in the Leominster union, and he had never acquired a settlement elsewhere. This Court held that the 35th section was retrospective, and that therefore the pauper at the age of sixteen acquired her father's settlement, which was a birth settlement, and could be ascertained without inquiry into his derivative settlement. That decision is exactly in point, and is conclusive. The provision as to illegitimate children supports this contention, for the previous Act, 4 & 5 Wm. 4, c. 76, s. 71, enacted that a bastard child should "have and follow" the settlement of its mother until such child should attain the age of sixteen, or should acquire a settlement in its own right, and it was held that it followed the settlement of the mother until sixteen, and then reverted to birth settlement: *Overseers of Bodenham* v. *Overseers of Saint Andrews*. (2) The present Act says it shall retain the settlement of its mother until such child acquires another settlement. In *Guardians of Tenterden Poor Law Union* v. *Guardians of St. Mary, Islington* (3) the Court only held that a bastard who attained the age of sixteen before the new Act had ceased to have the settlement of her mother. Legitimate and illegitimate children are now put on the same footing, and follow the settlement of the parent to sixteen, and from that time keep it until they acquire another, but do not thenceforth take any other settlement of the parent.

The practical object of the Act was the abolition of the law of emancipation, which created great difficulties. In *Guardians of Liverpool* v. *Overseers of Portsea* (4) the children of a deceased father were held to take his settlement, and the only difference between that case and the *Hereford Case* (5) is that in the *Liverpool Case* (4) the children were under sixteen. It was there also held that the latter part of s. 35 did not apply, because as the father had no derivative settlement there was no necessity to inquire into it. In *Reg.* v. *Bridgnorth* (6) it was sought to

(1) 48 L. J. (M.C.) 111.
(2) 1 E. & B. 465.
(3) 47 L. J. (M.C.) 81.
(4) 12 Q. B. D. 303.
(5) 48 L. J. (M.C.) 111.
(6) 11 Q. B. D. 314.

inquire into the settlement of the grandfather of the pauper children. In *Reg.* v. *Guardians of Marylebone* (1) the Court said that the enactment assumes that some inquiry must take place as to the settlement of the parent, but as soon as it is ascertained to be a derivative settlement that settlement must be rejected. Here, however, the settlement of the father was not derivative, and the pauper has taken it and retained it.

Tickell, in reply. The derivative settlement of a pauper above sixteen at the time of inquiry is taken away by the first part of s. 35. She is no such child as is there excepted.

POLLOCK, B. I have felt the difficulty of giving effect to every part of s. 35, and I have been puzzled by the words with respect to a child under the age of sixteen, "which child shall take the settlement of its father up to that age, . . . and shall retain the settlement so taken until it shall acquire another." It is difficult to give effect to those words "retain the settlement" without adopting the argument of Mr. Poland. But, having regard to the terms of the Act, and to what has been said very distinctly in *Reg.* v. *Guardians of Bridgnorth* (2) by the Master of the Rolls and Cotton, L.J., I think the true construction of the section is this: The first object was to abolish derivative settlements; and although settlements derived from parents by children are up to a certain age excepted, derivative settlements from grandparents are not. It seems to have been intended to do away with derivative settlements from the father except in the excepted cases. What are those? A wife from her husband and a child under the age of sixteen. The plain and ordinary meaning or construction of s. 35 seems to me to be, that when any Court is called on to inquire as to what is the settlement of any pauper person, that then "*no person*" shall be deemed to take a derivative settlement except in the case of a wife or of a child under sixteen, that exception not applying to a person of twenty-eight years, as here, who was *once* under sixteen; and the words following "to retain the settlement" are satisfied by saying that they apply to a child which is removed under the age of sixteen, when the Court must look and see what settlement that child took at the

(1) 13 Q. B. D. 15. (2) 11 Q. B. D. 314.

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time of the removal. That seems the true construction, although the words of the section may not be easy to reconcile. I think the court of quarter sessions was wrong, and that the decision must be quashed.

DAY, J. I only differ from my Brother Pollock on one immaterial point, and that is this, that I cannot entertain any doubt as to the true construction of this section. I think that the construction given to it by Mr. Tickell is clearly right. The object of the section is to get rid, as far as may be, of all derivative settlements. The section begins, "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise." If the section stopped there, there would be an end of derivative settlements altogether. But injustice would be done in many cases, viz., in cases of children under sixteen, and in cases of wives, for in the cases of children they would often be separated from their parents by being sent to the settlement of birth; and so it appears that the exception is most properly introduced "except in the case of a wife from her husband and in the case of a child under the age of sixteen." The time of "deeming" is that of adjudicating, and when the tribunal has before it the case of a child under sixteen such child is not to be separated from its parent. This is the clear meaning which is consistent with the words of the Act and carries out the object of it. The section then goes on to provide for such child's future settlement, and enacts that although there shall be no derivative settlement which would remove it from the settlement of the father, where it is a child under the age of sixteen it shall *retain* the settlement of the father. It shall retain it until death, it may be, or until it acquires another. It is an exception engrafted on the general declaration as to derivative settlements. Then Mr. Poland points out the provision as to illegitimate children. It is not worded so clearly as it might have been; but it seems to relate to an illegitimate child such as before dealt with, viz., under the age of sixteen, whose settlement is being adjudicated upon, it shall *take* and retain the settlement of its mother until such child acquires another settlement. That clause might well have been introduced because an illegitimate child

has, in the eye of the law, no father, and the clause provides for an illegitimate child as the preceding clause provides for a legitimate child. The further part of the section is to remove the great expense and difficulty which used to be caused in the search for derivative settlements; and, having to retain them in the two cases of a wife and of a child under the age of sixteen, the section tries to get rid of the old grievances and cost, and enacts that whenever it would be necessary to search for the derivative settlement of the father, no such inquiry is to be made, and the child must take a birth settlement. Then as to the cases; in *Guardians of Hereford Union* v. *Guardians of Warwick Union* (1) this point was not even considered. The question there was as to the Act being retrospective, and nobody doubts it was retrospective. The next case is *Guardians of Liverpool* v. *Overseers of Portsea* (2), there the children were under the age of sixteen, and the case does not in any way conflict with other cases. As to the case before the Court of Appeal (3), whatever may be the matter decided, the spirit of the judgment is completely in accordance with the construction I now put on the same section.

Order of quarter sessions quashed, with costs.

Solicitor for appellants: *F. Shelton.*

Solicitor for respondents: *William Lewis.*

(1) 48 L. J. (M.C.) 111. (2) 12 Q. B. D. 303.

(3) *Reg.* v. *Bridgnorth*, 9 Q. B. D. 765; 11 Q. B. D. 314.

R.

1885
May 14.

BAINES *v.* WRIGHT AND ANOTHER.

Bankruptcy—Composition—Secured Creditor—Deposit of Goods—Bill given for Debt indorsed away—Composition paid to Indorsee without deducting Value of Security.

The plaintiff gave credit to the defendants for goods sold, and made advances to them, goods being deposited by the defendants with the plaintiff as security, and bills being drawn by the plaintiff and accepted by the defendants for the amounts of the goods sold and advances made.

The plaintiff indorsed away such bills for value. During the currency thereof the defendants filed a petition for liquidation by way of arrangement or composition with their creditors under the Bankruptcy Act, 1869. The creditors of the defendants passed resolutions for the acceptance of a composition. The holders of the bills, by arrangement between themselves and the plaintiff, claimed and were paid the composition on the total amounts of the bills, the plaintiff paying them the balance thereof. The plaintiff having realized his security by sale of the goods deposited claimed to hold the proceeds against the balance so paid by him upon the bills:—

Held, that under the above circumstances the plaintiff could not be considered to have abandoned or forfeited his right to the security, but that the plaintiff was not entitled to stand in a better position than that which he would have occupied if he had not negotiated the bills, in which case he could only have received a composition on the balance of his debt after deducting the value of the security; and that consequently he was bound to account to the defendants for the amount by which the composition paid on the bills exceeded that which would have been paid if the value of the security had been deducted before ascertaining the amount of the composition.

ACTION for goods sold and delivered and interest on a balance of account.

The defendants by their defence admitted the claim, except as to a small portion of the interest claimed, but set up a counter-claim, the nature of which appears from the report of the special referee hereinafter set forth.

By order of nisi prius the action and counter-claim were referred to a special referee, who was to find all the facts and raise all issues of law for the Queen's Bench Division, who should have power to draw inferences.

The special referee reported in the following terms:

1. The plaintiff is a wool merchant, and the defendants are wool spinners and manufacturers, both carrying on business at Bradford.

2. Previously to the month of January, 1881, the defendants had purchased considerable quantities of wool from the plaintiff in the ordinary way of business. In January, 1881, the defendants were indebted to the plaintiff in a large amount for wool

sold, for which they had given the plaintiff bills accepted by them. In the early part of 1881 the defendants applied to the plaintiff to make them cash advances in addition to the credit which they had on their trade account. The plaintiff consented to do this upon (substantially) the following terms, viz., the defendants were to deposit the wool with the plaintiff against the cash advances made by him, and were also from time to time to accept bills drawn by the plaintiff for the amount of the advances and for interest thereon at 5*l.* per cent. per annum in addition to the usual bank charges, and a commission of a halfpenny per pound on any wool sold by the plaintiff.

3. Between the commencement of 1881 and the 24th of August, 1882, the defendants purchased from the plaintiff large quantities of wool for the purposes of their business, for which they gave him their acceptances, and they also during the same period deposited with him large quantities of wool by way of security, and from time to time accepted bills for sums advanced to them by the plaintiff and for bank charges, interest, and commission.

4. On the 24th of August, 1882, the defendants filed a petition for the liquidation of their affairs by arrangement or composition with creditors under the provisions of the Bankruptcy Act, 1869. At this time the following was the state of their account with the plaintiff:—

DEBTOR.	£	*s.*	*d.*	£	*s.*	*d.*
Amount due on trade account made up as below				2226	13	0
Bill due 7th Sept. 1882	351	13	0			
„ „ 29th „ „	752	11	6			
„ „ 25th Oct. „	340	0	0			
„ „ 25th Nov. „	474	18	0			
Not covered by acceptance	307	10	6			
	£2226	13	0			
Amount due on advance account made up as below				3238	15	4
Bill due 30th Aug. 1882	500	0	0			
„ „ „ „	650	3	4			
„ „ 26th Sept. „	451	7	0			
„ „ 26th Oct. „	1637	5	0			
	£3238	15	4			
				£5465	8	4

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CREDITOR.	£	s.	d.
Balance in plaintiff's hands from sale of wool	537	3	2
Wool deposited which subsequently realised when sold	3236	1	0
	£3773	4	2

	£	s.	d.
Debtor	5465	8	4
Creditor	3773	4	2
Balance	£1692	4	2

5. At the date of the liquidation petition the plaintiff had negotiated the whole of the above bills which had been accepted by the defendants, and which were then current. Some of these bills were in the hands of the plaintiff's bankers, who had discounted them for him and had credited his account with the amounts less discount, and the remainder were held by creditors of the plaintiff to whom he had indorsed them for value.

6. Statutory meetings of the creditors of the defendants were duly held, at which it was resolved to accept a composition of 6*s.* in the pound, payable by instalments extending over two years, and for which bills were to be given by the defendants, in satisfaction of their debts.

7. By an arrangement between the plaintiff and the various holders of the said bills the latter claimed and were paid the said composition of 6*s.* in the pound in respect of the whole of the said bills. The arrangement between the plaintiff and the holders of the bills was to the effect that the plaintiff was to be credited in account with the amount of the composition, and that he should make up the difference between the composition received and the amount of the bills, and this arrangement has been carried out. In one or two cases he paid the amounts due on the bills before any dividend was received in respect thereof.

8. The defendants protested against the holders of the bills proving for and receiving the composition in respect of the full amount of the bills without giving credit for the security held by the plaintiff, but were advised that they had no alternative but to admit the proofs and pay the composition, which they did, the composition amounting to 1547*l.* 8*s.* The plaintiff did not send in any proof or claim any dividend.

9. After the registration of the resolutions, the defendants continued to carry on their business and to purchase wool from the plaintiff, but they always claimed to be indemnified by him from the bills which he had negotiated as above mentioned.

10. At the commencement of this action the defendants were indebted to the plaintiff in the sum of 938*l.* 6*s.* 9*d.* for wool purchased by them since the date of the liquidation proceedings. The defendants refused to pay this amount, in order to compel the plaintiff to bring this action, and so raise the questions of law involved in it.

11. The principal question of fact which I was called upon to decide on the hearing of the reference was whether or not the wool held by the plaintiff at the date of the liquidation proceedings had been deposited with him as security for the advance account only, or for both the advance and trade accounts. I find as a fact that it had been deposited with him as a security for both accounts.

12. Upon this finding the defendants contend that they were entitled for the purposes of the composition to have the matter dealt with as if the bills which were then current had not been negotiated. They allege that the plaintiff was bound to indemnify them against the bills which were in the hands of third parties, and that he and the holders of the bills, jointly or severally, were only entitled to be paid the composition on the balance of the debt due to the plaintiff after giving credit for the security held by him. This balance has been previously stated to be 1692*l.* 4*s.* 2*d.*, the composition dividend on which would be 507*l.* 13*s.* 2*d.*, instead of 1547*l.* 8*s.* 0*d.*, which the defendants have paid to the holders of the bills, making a difference in the defendants' favour of 1039*l.* 14*s.* 10*d.*, and, deducting from this amount 938*l.* 6*s.* 9*d.* claimed by the plaintiff, an ultimate balance of 101*l.* 8*s.* 1*d.* would be left in the defendants' favour. They also contend in the alternative that, inasmuch as the plaintiff has allowed proofs to be made in respect of the current bills, he has abandoned or forfeited his right to the security held by him, and that the defendants are entitled thereto, less the amount admitted to be due to the plaintiff for goods sold since the liquidation proceedings.

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13. The plaintiff contends that as a secured creditor he was entitled to avail himself of his security to its utmost extent, and that there is no legal or equitable principle which would prevent his retaining his security notwithstanding that he had negotiated the bills which were given as a collateral security for his debt, and that, as he bargained for both goods and bills before making the advances, he is entitled to the benefit of both.

May 13. *R. O. B. Lane*, and *Bramwell Davis*, for the plaintiff, moved for judgment for 938*l.* 6*s.* 9*d.*, upon the report of the special referee. The plaintiff was entitled to apply the proceeds of his security to the balance remaining unpaid after the payment of the composition to the holders of the bills. The plaintiff did not prove under the composition. A secured creditor cannot, so long as he does not prove his debt in bankruptcy, be compelled to give up his security, and is entitled to hold it for any amount that may remain due to him for which it was given as security. The question to what the security was intended to be applicable must depend upon the true nature of the contract with regard to such security. It is clear that the intention in this case was that the plaintiff should have the double security of the wool and the bills, and that the plaintiff should get the bills discounted, for otherwise there would be no meaning in giving bills; and consequently he would be liable on the bills to the indorsees, if the bills were not met, to the extent to which they were not met, and the defendants would be liable to him on the bills to the same extent. It is therefore obvious that the meaning of the transaction is that the wool was to stand as a security for the ultimate liability that might arise to the plaintiff upon the transaction, that is to say, for any deficiency upon the bills which the plaintiff might have to meet.

It is clear that, apart from any question of bankruptcy, the plaintiff would be entitled by the contract between himself and the defendants so to apply the security; and it is submitted that there is no rule or principle in bankruptcy law that can alter this contract as to the security as between the plaintiff and the defendants, or make any difference in the result. The defendants' counter-claim stands really on the same footing as an application

to redeem the property mortgaged. They admit that the plaintiff has not received 20*s.* in the pound, and therefore they cannot be entitled to claim any of the proceeds of the security. There is no question here of double proof. The debt to which the security is applicable only arises upon the failure of the acceptors to meet the bills in full. It is submitted that the contention that the plaintiff has done anything to forfeit or abandon his security is quite untenable. Proof by the holders of the bills is not for this purpose equivalent to proof by the plaintiff himself. [They cited *Re Yewdall* (1); *Ex parte Mann* (2); *Ex parte Waring* (3); *Royal Bank of Scotland* v. *Commercial Bank of Scotland.* (4)]

Horace Davey, Q.C., and *E. Tindal Atkinson*, for the defendants, shewed cause against the plaintiff's motion, and moved to enter judgment for the defendants. There was nothing special in the terms of the arrangement between the parties. It is simply the ordinary case of advances made on one side and bills given and security deposited on the other. There is no stipulation that the security should be applicable to the ultimate liability that might arise to the plaintiff on the bills. The fallacy of the argument for the plaintiff is that it takes no account of the effect of the law of bankruptcy as applicable to the transaction between the plaintiff and defendants. The arrangement by composition for this purpose stands on the same footing as a bankruptcy.

It is quite true that, if there had not been the equivalent of a bankruptcy, the plaintiff would have had the right he contends for; but the rules that apply to the case of mortgagor and mortgagee uncomplicated by the fact of bankruptcy are not applicable. It is submitted that the giving of a bill does not, for this purpose, create another debt: there is only in substance one debt, viz., the original debt for goods sold or money advanced as a security for which the wool was deposited: and the effect of proving in respect of that one debt without valuing and deducting the value of the security is to abandon the security.

[POLLOCK, B. I do not see how the conduct of the holders of the bills in proving, as they had a right to do, can amount to an election by the plaintiff to abandon his security.]

It is clear from the findings of the referee that the proof by

(1) 46 L. J. (Bkcy.) 87, 109.
(2) 5 Ch. D. 367.
(3) 19 Ves. 345; 2 Rose, 182.
(4) 7 App. Cas. 366.

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the holders of the bills was in substance a proof by the plaintiff. It was made by arrangement between the plaintiff and the holders of the bills, and in some cases he actually paid the amount of the bills in full to the holders before the composition was paid. In substance he took up the bills and made them his own, and the holders proved as his agents.

[POLLOCK, B. That seems rather a strong inference. It might be that he only advanced them the money knowing that the effect would ultimately be the same, to prevent their having to wait, and not as meaning to make the bills his own.]

It cannot be that by an assignment of a debt, which is all that the indorsement of the bill amounts to, there can, in the event of bankruptcy, be a right of proof without deducting the security which the creditor would not under ordinary circumstances have had if the debt had remained unassigned. The creditor who has assigned the debt, whether by means of a bill of exchange or otherwise, cannot stand by and allow, or, as in this case, procure the assignee to prove for the whole debt, and then claim to apply his security to the balance, and so throw on the estate a heavier charge than he would have been able to throw on it if he had not assigned the debt. The security is for the whole amount of the debt, and must be applied to the whole of it. The plaintiff seeks to apply it to the balance only after deducting the composition.

The observations of Mellish, L.J., in *Ex parte Mann* (1) are quite conclusive on the point. It is clear law that by no manipulation can the creditor convert his debt into two debts so as to evade the rule of bankruptcy law on the subject, and throw a greater burthen on the estate: *Couldery* v. *Bartrum* (2); *In re Oriental Commercial Bank* (3); *Société Générale de Paris* v. *Geen*. (4) It is contended, first, that the plaintiff has, through the holders of the bills, elected to abandon his security, and the defendants are entitled to judgment on that footing; secondly, that, if that is not so, they are entitled to a judgment on the footing that they are to be put in the same position as if the plaintiff had valued the security, and the composition had been only on the balance.

R. O. B. Lane, in reply. Admitting that there is only one debt

(1) 5 Ch. D. 367.
(2) 19 Ch. D. 394.
(3) Law Rep. 7 Ch. 99.
(4) 8 App. Cas. 606.

for the purposes of proof, that does not affect the question what the plaintiff's right as to the security was under the contract with regard thereto, and to what such security was applicable. The proof may extinguish or discharge the debt, but the right to the security remains. Suppose that there had been instead of the arrangement under the Bankruptcy Act, 1869, a common law composition reserving the right to securities. The Act only affects the relation between the parties as creditor and debtor. It does not affect the relation between them as mortgagor and mortgagee. If, as is contended, the effect of the transaction is that the wool was to be a security to the plaintiff against the ultimate liability on the bills, there is nothing in the bankruptcy law to affect his right in that respect.

May 14. POLLOCK, B. This is an action for goods sold and delivered. The defendants practically admitted the claim but set up a counter-claim under the following circumstances. It appears that the plaintiff had in his possession certain wool deposited by way of security, as to which there was a dispute whether it covered merely the advance account or both the trade and advance accounts between the plaintiff and the defendants. That question appears to have been one of some difficulty, and the case having been referred to a referee to find the facts, he has found that the security covered both accounts. The questions which arise relate to the application of that security. The defendants say that the security in question must be applied to the total original debt due from the defendants to the plaintiff. The plaintiff says that is not so, because there is another claim to which the security is applicable. Bills of exchange were accepted by the defendants for the sums due from them and indorsed away by the plaintiff, and it was argued that, if these were not paid in full, any deficiency would fall upon the plaintiff in the form of a claim by the indorsees against him, and that he would have a claim over upon the bills against the defendants, and that the security was applicable to such claim. The defendants' contention upon the findings of the referee is twofold: first, they contend that they were entitled for the purposes of the composition to have the matter dealt with as if the bills which were then

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current had not been negotiated; that the plaintiff was bound to indemnify them against the bills which were in the hands of third parties; and that he and the holders of the bills jointly or severally were only entitled to be paid the composition on the balance of the debt due to the plaintiff after giving credit for the security held by him. The referee goes into the account, and shews that on this contention a balance of £101 8*s.* 1*d.* would be due to the defendants. The defendants in the alternative contend that by the arrangement made as to the proof by the holders of the bills the plaintiff abandoned or forfeited his right to the security altogether. I will deal first with this latter contention on behalf of the defendants, which was based upon the finding by the referee in paragraph 7 of his report, where he finds that the proof upon the bills was made by arrangement between the plaintiff and the holders, and that he paid the amounts of the bills in one or two cases before any dividend was paid in respect of them. It is suggested that this course of conduct in substance amounted to taking up the bills, that the plaintiff had really become the holder of the bills in law, and that by the arrangement so made as to proof he abandoned his security. I do not say that there is not a good deal to be said in favour of that view, but on the whole, looking to the scope and nature of the arrangement as stated by the report of the referee, and the circumstances under which it was made, I am not prepared to say that the effect of it was to put the plaintiff in the position of holder of those bills, or that he must be considered as having abandoned his security. I come, therefore, to the first of the defendants' contentions as stated by the report. That contention is in effect that the plaintiff cannot by the indorsement of the bills be placed in any better position than if he had continued to hold them himself throughout. I do not propose to discuss on the present occasion the propriety or policy of the rule, which is well established as applicable in cases of bankruptcy, and upon which the defendants rely. The only question for us is whether that rule is applicable under the circumstances of the present case. I think the plaintiff's counsel very fairly put the real question as turning upon the true nature and character of the dealing between the plaintiff and defendants. I was a good

deal impressed by their argument, and, if it could be established that in a case of this sort the nature of the contract is such that for the purposes of this question two debts must be considered to arise under it, one being the original advance and the other the claim upon the bill, I should have been disposed to agree with their contention. But I cannot, looking at the substance of the thing, come to that conclusion. There was no special provision in this case by which the parties endeavoured to create any such double liability in express terms. The transaction, the effect of which we have to determine, is a transaction of the ordinary character, in which advances were made, and goods were deposited and bills given to secure such advances. It seems to me that for the purposes of the present question such a transaction creates one debt only. This appears to me to be shewn by what was said by Mellish, L.J., in *In re Oriental Commercial Bank* (1). He says: "The principle itself—that an insolvent estate, whether wound up in Chancery or Bankruptcy, ought not to pay two dividends in respect of the same debt—appears to me to be a perfectly sound principle. If it were not so, a creditor could always manage by getting his debtor to enter into several contracts with different people for the same debt to obtain higher dividends than the other creditors, and perhaps get his debt paid in full. I apprehend that is what the law will not allow; the true principle is that there is only to be one dividend in respect of what is in substance the same debt, although there may be two separate contracts." I should suppose that any commercial man would say that in such a case as this there was one debt for goods sold and delivered or money advanced, as the case might be, secured by a deposit of goods, and that it would never occur to him that it made any difference in this respect that bills of exchange had been given. Such bills, of course, during their currency suspend the remedy on the debt, but that debt forms the consideration for the acceptance of the bills, and is really the debt due; and upon the dishonour of the bill the original consideration may be sued upon. It is true that the intention is that the bills shall be indorsed; that necessarily follows from the nature of the transaction, and the argument is

(1) Law Rep. 7 Ch. 99, at p. 103.

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not carried any further by shewing that in the particular case there was a specific intention to this effect. But I do not see that this alters the case. It appears to me that it is as much a matter of commercial understanding as a conclusion of law that for the purposes of the bankruptcy law there is in such a case as this in substance only one single debt, though there may be more than one contract arising out of the transaction. It seems to me to follow that it would be contrary to the well established policy of the bankruptcy law if more than the proper dividend could be recovered upon that one single debt, and it cannot make any difference whether the bills were indorsed or not. If I had any doubt it would be removed by the case of *Ex parte Mann.* (1) The security there given was no doubt of a different nature, but there is no difference in principle.

There, as here, the debt was covered by bills, and it is clear to me that both Lords Justices thought that the parties could not, by any arrangement they might make, turn what was in substance one debt into two. Mellish, L.J., there said: "Are you entitled to put the money produced by the security into your pocket until you have paid or taken up the bills? There is no debt due to you now from the acceptors. You have been paid by means of the discount. If you were the holders of the bills you could not prove on them without deducting the value of your security. Are you entitled to stand in a better position because you have discounted them?" On these grounds we adopt the first contention set up by the defendants as set forth in the 12th paragraph of the report of the referee.

DAY, J. I agree. In this case the plaintiff gave credit to the defendants for goods, and also advanced money to them. Thus a debt was created. Against this debt certain bills of exchange were drawn and accepted by the defendants. To my mind there is only one debt and not two. There is only one debt in substance though in point of form there may be two contracts. In respect of this one debt the plaintiff takes as security a deposit of certain wool. The bills of exchange are indorsed away, but this indorsement does not, as it seems to me, create any fresh debt

(1) 5 Ch. D. 367.

to the plaintiff so far as the debtors are concerned. They still owe the original one debt, neither more nor less. While these bills are current the defendants compound with their creditors, and the holders of the bills, in pursuance of the arrangement set forth in the report of the referee, prove in respect of the bills. This proof must, I think, be taken to enure to the benefit of all parties interested in the one debt for which alone, in my opinion, the defendants are liable, including the plaintiff. So, also, in my opinion, must any burdensome consequences of such proof enure against all such parties, including the plaintiff. If the plaintiff had proved himself without valuing his security he would be treated in bankruptcy as having abandoned such security. I am not prepared, however, to hold that the proof made by arrangement between himself and the holders of the bills has the same effect for this purpose as a proof by the plaintiff himself. But it does seem to me that, such proof being made, and the holders having received the composition upon the full amounts of the bills, the plaintiff is bound to repay to the defendants the amount by which the composition actually paid exceeds that which would have been paid if the security had been valued, and its value deducted from the total debt, and the composition paid only on the balance.

Judgment for the defendants.

Solicitors for plaintiff: *Jaques, Layton, & Jaques, for Watson & Dickons.*

Solicitors for defendants: *Bigg, Chubb, & Adams, for Gardner & Jeffrey.*

E. L.

1885
May 20.

[IN THE COURT OF APPEAL.]

PEARCE *v.* FOSTER AND OTHERS.

Practice—Discovery of Documents—Privilege—Documents privileged in Previous Action by Plaintiff against a Third Party—Order XXXI., rr. 12–14.

An order having been made for discovery of documents by the plaintiff in an action, the plaintiff stated on affidavit that, among other documents relating to the matters in question in the action, he had in his possession certain documents partially prepared by his solicitors in an action previously brought by him against one D. (a person other than the defendant) for future use in carrying on the said action, but which were, in fact, never completed or used owing to such action not proceeding in consequence of D.'s death, and that the whole of the said documents were of a private and confidential nature between counsel, solicitor, and client:—

Held, that the documents were privileged from discovery in the action.

Bullock v *Corry* (3 Q. B. D. 356) followed.

APPEAL from the judgment of the Queen's Bench Division affirming the decision of Field, J., at chambers, refusing to make an order for further discovery of documents. The facts were as follows: The action was for wrongful dismissal of a clerk. The statement of defence, among other matters, justified the dismissal on the ground that, at the time of his engagement by the defendants as their principal clerk, the plaintiff had been, and was, unknown to the defendants, engaged in carrying on the business of a speculator on the Stock Exchange, and the plaintiff, knowing, as the facts were, that it was against the interest of the defendants to employ, and that they would not employ, as their principal clerk a person carrying on such a business, concealed all knowledge of the same from the defendants and continued to carry on such business, and left the defendants in ignorance of the fact that he had been, or was, engaged in carrying on such business down to the 1st of August, 1884, when they first became aware thereof, and, it being then, as theretofore, against the interest of the defendants to have or continue in their employment a person carrying on such a business, they dismissed the plaintiff.

The defendants applied for and obtained an order for discovery of documents by the plaintiff.

The affidavit of discovery made by the plaintiff under such

order stated that the plaintiff had in his possession or control the documents relating to the matters in question in the action set forth in the first and second parts of the first schedule thereto, and that he objected to produce the documents set forth in the second part of the said first schedule on the ground that they were privileged. Among the documents set forth in the second part of the schedule were documents which were described as "The papers of my counsel and solicitors in an action in the Chancery Division between me, the above-named John Pearce, plaintiff, and William Detmar, defendant, the said papers consisting of briefs of my counsel, instructions to my counsel and solicitors, and other papers dated or written after the commencement of the said action or in contemplation of or in and for the conduct thereof." The affidavit of discovery being objected to as insufficient in respect to these documents, the plaintiff was ordered to make a further affidavit by way of discovery, which he accordingly did. In such further affidavit, the plaintiff stated that the whole of the said documents were tied up in a bundle marked by the letter B and initialled by him, and that they came into existence for the use of his counsel and solicitors in an action wherein he was plaintiff and William Detmar defendant, or in contemplation of the litigation therein, and being such confidential documents as aforesaid were privileged from production, and he objected to produce the same on the ground that having once been privileged the said documents continued to be privileged from production.

In a third affidavit the plaintiff stated that the action brought by him against Detmar never proceeded beyond delivery of defence, in consequence of the death of Detmar, and he was willing to allow the defendants to inspect the statement of claim, defence, and counter-claim therein, and a copy of certain items of account between himself and Detmar: that no documents were procured from any third person or from the said Detmar, and that no evidence was taken or procured in the action from any third person by the plaintiff's solicitors: and that the whole of the documents in the bundle marked B (other than the documents thereinbefore mentioned, which he was willing the defendants should inspect) consisted of drafts and originals of instructions to counsel

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prepared by his solicitors, and counsel's opinions and notes, and plaintiff's confidential memoranda sent to his solicitors during the said action or in contemplation of the commencement thereof containing plaintiff's instructions to them as to the said action, and of documents partially prepared by his solicitors in the said action for future use in carrying on the said action, but which were in fact never completed or used owing to the action proceeding no further than as before mentioned, and that the whole of the said documents were, with the exceptions before mentioned, of a private and confidential nature between counsel, solicitors, and client, and were privileged from production.

It appeared that Detmar was a stockbroker, and the action brought by the plaintiff against him was for an account in respect of stockbroking transactions carried on between them.

The defendants applied at chambers for an order that plaintiff might set out on affidavit and produce the documents in the bundle marked B. The application was refused by the master, whose decision was affirmed on appeal by Field, J.

The defendants appealed from the judge at chambers, but the Divisional Court (Pollock, B., and Day, J.), affirmed his decision.

Stirling, and *Moulton*, for the defendants. It must be admitted that the defendants cannot claim further discovery with regard to the documents in the former action described in the plaintiff's third affidavit as instructions to counsel and opinions and confidential memoranda, &c., but with regard to the documents in such affidavit described as "documents partially prepared by my solicitors in the said action for future use in carrying on the said action," it is submitted that the affidavit is insufficient, and further discovery should be ordered. With regard to the documents so described two points arise, viz., first, whether it sufficiently appears from the statement of their nature that these documents were necessarily all of them privileged from discovery in the original action of *Pearce* v. *Detmar;* and, secondly, whether, assuming that to be so, the privilege necessarily extends to the present action.

The documents as described may include copies of documents made for the purposes of the action, the originals of which

existed before the action and independently thereof, and therefore could not be privileged. A document which comes into existence aliunde, and not for the purposes of the action, is not rendered privileged merely because it is handed to a solicitor for the purposes of the action. So a mere copy of such document made for the purposes of the action is not necessarily privileged: *Lyell* v. *Kennedy*. (1) It is quite true that, if the copy, extract, or other such document is of such a nature that what was passing in the mind of the solicitor by whom it was prepared may be disclosed by its production, it will be privileged, but it is submitted that the plaintiff's affidavit does not sufficiently shew that all these documents were of such a nature as to come within this privilege. The decisions do not go the length of holding that the fact that a document is prepared by a solicitor for future use in an action renders it privileged, unless the affidavit goes further and shews that by discovery of the document the mind of the professional adviser would be disclosed.

Secondly, it does not follow that because these documents might be privileged in the original action they would be privileged in the present action. It is possible that, in many cases, where documents are privileged from discovery in one action, the privilege might continue to be applicable to another action; but it is submitted that that can only be so, where the documents come within the class of documents as to which there is a professional privilege properly and strictly so called, as in the case of documents prepared for the purpose of getting advice from a solicitor, or where the action is between the same parties, or substantially the same parties, or where the subject-matter of the two actions is really identical or very closely connected. Here it is submitted that the documents are not sufficiently shewn to have been all of the class to which the professional privilege strictly so called applies; and the actions are between different parties, the subject-matter of one action being only indirectly connected with that of the other. In such a case the doctrine that once privileged always privileged cannot apply. There are, it is submitted, two heads of privilege; there is the professional privilege, and what may be called the litigious

(1) 27 Ch. D. 1.

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privilege. The former includes documents coming into existence in the course of professional communications between solicitor and client; and it is not disputed that such documents continue privileged after the litigation is over. The latter may exist with regard to the particular litigation in respect of documents which come into existence by the procurement of the solicitor for the purposes of the litigation, but it is submitted that it does not necessarily continue with regard to a subsequent action against another party. Suppose, for instance, that among the documents in question there was a list of the purchases and sales of stocks and shares made by the plaintiff through Detmar on the Stock Exchange, which was made by the procurement of the solicitor for the purposes of the former action, on what principle could that document be privileged in the present action?

[They cited *Walsham* v. *Stainton* (1), *Nicholl* v. *Jones* (2), *Bullock* v. *Corry* (3), and *Holmes* v. *Baddeley*. (4)]

English Harrison, for the plaintiff. It is submitted that upon the true construction of the plaintiff's affidavit it distinctly shews that these documents were prepared for the purposes of confidential communications between solicitor and client with regard to the conduct of the former action, and so the professional privilege as admitted by the defendants' counsel would apply.

[He was stopped by the Court.]

BRETT, M.R. In this case the affidavit of the plaintiff appears to me in substance to state that the documents in question are documents which were prepared by the solicitor in an action for use in the conduct of the action, and that they were so prepared to be used for the purpose of private and confidential communication between counsel, solicitor, and client in relation to the action. It seems to me, therefore, that they fall within the class of documents with regard to which there is a professional privilege, on the ground that they are brought into existence for the purposes or in the course of professional communications between solicitor and client. I do not think that, where docu-

(1) 2 H. & M. 1.
(2) 2 H. & M. 588.
(3) 3 Q. B. D. 356.
(4) 1 Ph. 476.

ments are already in existence aliunde, the mere fact of their being handed to a solicitor for the purposes of the conduct of the action can create a privilege; but, where documents are brought into existence by a solicitor or through a solicitor for the purposes of consultation with such solicitor, with a view to his giving professional advice or to the conduct of an action, these are in the nature of professional communications, and are as such privileged. It seems to me clear that these documents did come into existence for the purposes of the consideration of the course to be pursued in the conduct of an action, although the action did not ultimately proceed. Then the question arises whether, assuming them to be within this privilege, the privilege is any the less applicable because in the present case the inquiries with regard to the documents are being made in an action other than that in regard to which they were originally brought into existence. I do not think, if they were privileged in relation to the first action, that the privilege ceases in relation to another action. The case of *Bullock* v. *Corry* (1) seems to me to be an authority for that conclusion, and the judgment of Cockburn, C.J., in that case, lays down a most valuable principle on this subject. There the documents in question were being inquired about in a different action from that in relation to which they originally came into existence, and the Lord Chief Justice said: "The privilege which attaches by the invariable practice of our Courts to communications between solicitor and client ought to be carefully preserved. In my opinion the rule is, once privileged always privileged. This will apply à fortiori where the succeeding action is substantially the same as that in which the documents were used." This is a clear intimation of opinion that, if a document is once so privileged, the fact that it is another action in which it is being inquired about will not destroy the privilege. It seems to me that the expressions used by Lord Lyndhurst in the case of *Holmes* v. *Baddeley* (2) really imply that he was of the same opinion. On principle I agree with the opinion so expressed. The privilege with regard to confidential communications between solicitor and client for professional purposes ought to be preserved, and not frittered away. The reason of the privilege is that there may be that free

(1) 3 Q. B. D. 356. (2) 1 Ph. 476, at p. 482.

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and confident communication between solicitor and client which lies at the foundation of the use and service of the solicitor to the client; but, if at any time or under any circumstances such communications are subject to discovery, it is obvious that this freedom of communication will be impaired. The liability of such communications to discovery in a subsequent action would have this effect as well as their liability to discovery in the original action. On these grounds I think that the affidavit shews sufficiently that these documents were privileged, and that this appeal should be dismissed.

BAGGALLAY, L.J. I agree in the conclusion at which the Master of the Rolls has arrived. I desire to express myself as strongly as he has done on the impolicy of frittering away the privilege with regard to matters passing between solicitor and client. It is hardly necessary, for the purposes of this case, for me to say whether I entirely agree with all the terms which he has used in expressing the principle governing these cases, as I think that this affidavit is clearly strong enough, having regard to the relation between the subject-matters at issue in both actions, to shew the existence of a privilege in this case. The decisions on the subject of discovery have been very conflicting, and certainly down to the time of Wigram, V.C., the tendency in these cases was in favour of discovery, the doctrine with regard to this kind of privilege not being considered as extending so far as there has been an inclination to extend it in the subsequent decisions. The expressions used in the case of *Wheeler* v. *Le Marchant* (1) appear to me to indicate very correctly the limits of the professional privilege with regard to communications passing between solicitor and client. However, as I have already said, it seems to me unnecessary to discuss the exact limits of the privilege, because the circumstances of the present case, in my opinion, clearly bring it well within those limits.

BOWEN, L.J. I am of the same opinion. This case does not, I think, raise any question with regard to documents which are not in the nature of professional communications, for on the true

(1) 17 Ch. D. 675.

reading of this affidavit it seems to me that the documents of which it is sought to obtain discovery are, in effect, stated to be documents prepared by the solicitor for the purposes of the previous action, and for confidential use between counsel, solicitor, and client. They, therefore, may be said to be professional documents, and as such are clearly brought within the description of documents held to be privileged in *Lyell* v. *Kennedy*. (1) It may possibly be that it is not true for all purposes, and with regard to all classes of documents, to say that a document once privileged is always privileged. It is to be observed that in *Bullock* v. *Corry* (2) the Chief Justice was dealing with the class of documents only which I have called professional documents, and the expressions he used with regard thereto were really a repetition of the principle laid down in *Wilson* v. *Rastall*. (3) I agree that the appeal must be dismissed.

BRETT, M.R. I desire to add that the governing principle on the subject seems to me to be correctly laid down in Bray on Discovery, at page 371, where the author says: "It would seem clear that the extension of the privilege to all professional communications, whether passing in reference to litigation or not, must cover those which pass in reference to litigation with other persons or with the same persons at other times."

Appeal dismissed.

Solicitors for plaintiff: *Roy & Cartwright.*
Solicitor for defendants: *Clements.*

(1) 27 Ch. D. 1. (2) 3 Q. B. D. 356.
(3) 4 T. R. 753.

E. L.

1885
May 4.

[IN THE COURT OF APPEAL.]

THE QUEEN ON THE PROSECUTION OF HILLMAN *v.* WHITFIELD, AND ANOTHER.

Lunatic—Custody of—Lunatic Asylums Act, 1853 (16 & 17 *Vict. c.* 97), *s.* 68—*Jurisdiction of Justices—Personal Examination by Justices of alleged Lunatic.*

In order to give two justices jurisdiction to make an order under s. 68 of the Lunatic Asylums Act, 1853, for the reception of a person into a lunatic asylum as a lunatic who is not a pauper, and not wandering at large, but who is not under proper care and control, it is not necessary that they should examine such person in the presence of the medical man whom they have called to their assistance, nor that the examination should be made with the knowledge of the alleged lunatic, so that he should have the opportunity of explaining, if he could, what might otherwise be signs of insanity.

Though his examination must not be a sham, yet if it be made by the justices bonâ fide for the purpose of satisfying themselves of the sanity or insanity of the person examined, it is sufficient, and their order is not without jurisdiction because the examination lasted only four or five minutes and was made at the door of the carriage in which the alleged lunatic was seated with his attendants preparatory to his being taken to the asylum :—

So *held* by Sir James Hannen, and Lindley, L.J. (Lord Coleridge, C.J., dissenting) :—

Held, by Lord Coleridge, C.J., that where the person deemed to be a lunatic is examined by two justices at his place of abode or elsewhere, the 68th section requires that one of such two justices must already have had, as a condition precedent to the vesting of the jurisdiction of the justices, either an information upon oath, or private or personal knowledge of his own as to the insanity of such person.

APPEAL from an order of the Divisional Court making absolute a rule nisi for a certiorari to bring up, for the purpose of quashing, an order made on the 24th of November, 1884, by the defendants, two justices of the county of Sussex, under s. 68 of the Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97), for the reception of Mr. Charles Hillman as a patient into the Sussex County Lunatic Asylum.

The following are the material facts as disclosed by the affidavits :—

On Monday, the 24th of November, 1884, Mr. Braden, a surgeon

practising in Lewes, gave notice to Mr. Shelley, the relieving officer of the Lewes Union, that the above mentioned Mr. Charles Hillman (who was a resident in Lewes, and had been so for many years), was insane, that his family refused to take charge of him, and that their solicitors had advised him to go to Mr. Shelley, and that he the relieving officer must act. Thereupon Mr. Shelley procured from the office of the magistrate's clerk the usual form of statement and medical certificate, and having afterwards gone to and seen Mr. Robert Hillman (who was Mr. Charles Hillman's cousin and to whom he had been referred by Mr. Charles Hillman's two brothers), and got from him the information he required for the purpose, he filled up and signed the form of statement.

This form was printed under the form of order to be signed by the justices for the reception of a patient in the Sussex Lunatic Asylum, and when filled up and signed by Mr. Shelley, it was as follows:—

"STATEMENT.

"Name of patient and Christian name at length	Charles Hillman.
"Sex and age	Male—67.
"Married, single, or widowed	Single.
"Condition of life and previous occupation (if any)	Gentleman.
"The religious persuasion as far as known	Church of England.
"Previous place of abode	Friars Walk.
"Whether first attack	Yes.
"Age (if known) on first attack . . .	67.
"When and where previously under care and treatment	Nowhere.
"Duration of existing attack	About a week.
"Supposed cause	Hereditary.
"Whether subject to epilepsy . . .	No.
"Whether suicidal	No.
"Whether dangerous to others . . .	No.
"Parish or union to which the lunatic is chargeable	Lewes Union.

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"Name and Christian name and place of abode of nearest known relative of the patient, and degree of relationship, if known . . . . . } Cousin—Robert Hillman, Esq., 104 High Street, Lewes.

"I certify that, to the best of my knowledge, the above particulars are correctly stated.

"(Signed) Francis Shelley,
"Relieving officer,
"North Street, Lewes, Sussex."

Mr. Shelley then went on that same day, the 24th of November, to the magistrates' clerk's office, and asked Mr. West, the magistrates' clerk, to make arrangements for the attendance of magistrates at the Fitzroy Library, where Mr. Charles Hillman was, so as to prevent the necessity, as Mr. Shelley stated in his affidavit, of bringing Mr. C. Hillman through the streets to the county hall. Accordingly, at the private reading rooms of the Fitzroy Library Mr. Shelley subsequently met the two magistrates, who are defendants in this case, namely, Mr. Whitfield and Mr. Thorne, Mr. Hillman being then in the public room, which was entered by glass doors, through which he could be seen as the magistrates entered the private reading room. Mr. Shelley then and there swore to the truth of the following information:—

"Sussex to wit. } "Information of Francis Shelley, relieving officer of the Lewes Union, in the county of Sussex, laid before us the undersigned, two of Her Majesty's justices of the peace, in and for the said county, this 24th day of November, 1884, who upon his oath saith that one Charles Hillman, at Friars Walk, in the parish of All Saints, in Lewes, in the said county, gentleman, who is not a pauper, and is not wandering at large, is deemed to be a person of unsound mind.

"Sworn this 24th day of November, 1884, at Lewes, in the county of Sussex.

"(Signed) Francis Shelley,

"Before us

"(Signed) Geo. Whitfield,
J. Thorne."

Mr. Shelley deposed in his affidavit that he not only swore to the correctness of this information, but that he further told the magistrates on oath that Mr. Hillman was not under proper care and control, and that his relations refused to take charge of him, and that from what he had himself seen on the previous day he had no doubt of Mr. Hillman's madness.

Shortly before this information was sworn, Dr. Crosskey, who was medical officer of the Lewes Union, and who stated in his affidavit that he had been requested to examine Mr. Hillman, with a view of considering the desirability of sending him to an asylum, went to the Fitzroy Library, where he found Mr. Hillman, and had there an interview with him of about half an hour, the result of which was that Dr. Crosskey was satisfied that Mr. Hillman was a lunatic, and ought to be placed under control. Dr. Crosskey then went to the office of Mr. Shelley, where he saw Sergeant Tucker, of the police, who told him that he had seen Mr. Hillman in an excited condition in the public streets, throwing his arms about and gesticulating. Dr. Crosskey then wrote and signed a certificate of lunacy, of which the following is a copy:—

"I, the undersigned Walter Francis Crosskey, being a doctor of medicine of the University of Glasgow, and being in actual practice as a surgeon, hereby certify that I, on the 24th day of November, 1884, at the Fitzroy Library, Lewes, in the county of Sussex, personally examined Charles Hillman, of Friars Walk, Lewes, and that the said Charles Hillman is a person of unsound mind, and a proper person to be taken charge of and detained under care and treatment, and that I have formed this opinion upon the following grounds, viz.:—

"1. Facts indicating insanity observed by myself. His general appearance and hurried and confused manner of talking indicate insanity. He rambles from one subject to another. He says that there is a conspiracy against him of a political character; that the chief attendant of St. Luke's Hospital has been in Lewes and has some plot against him; that there is an Irish plot going on round him.

"2. Other facts (if any) indicating insanity communicated to me by others.

"He has been in a very excited condition in the public street,

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talking loudly and throwing his arms about, communicated to me by James Tucker, police serjeant, Lewes.

"(Signed) Name.—Walter Francis Crosskey.

"Place of abode.—11, Albion Street, Lewes.

"Dated this 24th day of November, 1884."

After he had signed this certificate Dr. Crosskey went and saw the magistrates, the two defendants, in the reading room of the Fitzroy Library, when he fully stated to them the result of his examination, and informed them that he had satisfied himself that Mr. Hillman was a person of unsound mind and a proper person to be taken charge of in an asylum, and he then handed to the said magistrates the certificate of lunacy he had so signed. The magistrates were then on the point of entering the public library to personally examine Mr. Hillman, when they were informed that he had gone out of the library to his lodgings, which were just opposite, to get something to eat, and they, the magistrates, were requested to wait a short time, which they consented to do. In the meanwhile Tucker, the police serjeant, had gone with Mr. Shelley and others to Mr. Hillman's lodgings, had broken open the door of the room in which he was at dinner, and telling him that he must go with them to the County Lunatic Asylum, had compelled him to enter a carriage, which was drawn up in waiting at the door of the house. The carriage, then, with Mr. Hillman and Tucker, the police serjeant, and another man, inside, and with Mr. Shelley outside, was brought to the corner of the street, near the door of the Fitzroy Library, where it stopped, and the two magistrates, being informed that Mr. Hillman was there, went to the door of the carriage and personally examined him in the way thus described by Mr. Whitfield in the 8th and 9th paragraphs of his affidavit, which was as follows: Par. 8. "In order to avoid the necessity of taking Mr. Hillman out of the carriage and bringing him into the library, Mr. Thorne and I went to the carriage and personally examined him there. There were with him in the carriage Serjeant Tucker and another man. I spoke first. I asked Mr. Hillman how he was, he made no reply. Mr. Thorne then shook hands with him, and said, 'How are you?' He made no direct reply to this; he said 'Statements that I have made will be proved whether they are true are not, and that will be the proof

whether I am insane or not.' Mr. Hillman kept us talking all the time, the chief subject of his conversation being some I. O. U., of which I had no cognizance, and to which neither I nor Mr. Thorne had made any allusion. He also referred to insanity being an hereditary ailment in his family. He made no protest against being considered insane or against being taken to an asylum. The examination lasted, as far as I can judge, some four or five minutes." Par. 9. "I have been on friendly terms with Mr. Hillman forty years, and I can positively state that from my observation of Mr. Hillman's manner and conversation and general appearance, I came unhesitatingly to the conclusion that he was insane, and as I was satisfied that he was not under proper care and control, I considered him a proper person to be taken care of. I have, moreover, personal knowledge of the fact that three members of his family had been confined in a lunatic asylum."

Having concluded this examination the two magistrates returned to the library, and after some further deliberation with Dr. Crosskey, they signed the order for Mr. Hillman's reception into the lunatic asylum, and the order was as follows:—

"We, George Whitfield and Joseph Thorne, Esquires, the undersigned, having called to our assistance a surgeon, and having personally examined Charles Hillman, who is not a pauper, and being satisfied that the said Charles Hillman is a person of unsound mind, not under proper care and control, and a proper person to be taken charge of and detained under care and treatment, hereby direct you to receive the said Charles Hillman as a patient into your asylum. Subjoined is a statement respecting the said Charles Hillman. (1)

"(Signed) George Whitfield, Magistrate for Sussex.
J. Thorne, Mayor of Lewes.

"Dated the 24th day of November, 1884.

"To Dr. S. W. D. Williams, Medical Superintendent of the Sussex Lunatic Asylum, Hayward's Heath."

This order, having been so signed, was handed to Mr. Shelley, who thereupon conveyed Mr. Hillman to the asylum, where he

(1) The statement subjoined was the statement signed by Mr. Shelley as set out, *ante*, p. 123.

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was received and treated in all respects as a pauper lunatic until the 3rd of December, when he was removed to St. Luke's Hospital, London, from which he was discharged on the 5th of December, 1884, as not appearing to be insane.

The defendants denied that they had in any way authorized the apprehension of Mr. Hillman at his lodgings and his conveyance to the carriage, and it was admitted that the defendants had acted throughout in good faith and with the honest intention of discharging their duty as magistrates, but the Divisional Court (consisting of Grove, J., and Huddleston, B.) being of opinion that the requirements of s. 68 of the Lunatic Asylums Act, 1853 (1), under which the magistrate's order was professed to be

(1) The following is s. 68 of the Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97): "Every constable of any parish or place, and every relieving officer and overseer of any parish, who shall have knowledge that any person wandering at large within such parish or place (whether or not such person be a pauper) is deemed to be a lunatic, shall immediately apprehend and take or cause such person to be apprehended and taken before a justice; and it shall also be lawful for any justice upon its being made to appear to him by the information upon oath of any person whomsoever that any person wandering at large within the limits of his jurisdiction is deemed to be a lunatic, by an order under the hand and seal of such justice, to require any constable of the parish or place, or relieving officer or overseer of the parish where such person may be found, to apprehend him and bring him before such justice or some other justice having jurisdiction where such person may be found; and every constable of any parish or place and every relieving officer and overseer of any parish who shall have knowledge that any person in such parish or place, not a pauper and not wandering at large as aforesaid, is deemed to be a lunatic, and is not under proper care and control, or is cruelly treated or neglected by any relative or other person having the care or charge of him, shall, within three days after obtaining such knowledge, give information thereof upon oath to a justice, and in case it be made to appear to any justice upon such information or upon the information upon oath of any person whomsoever, that any person within the limits of his jurisdiction, not a pauper and not wandering at large, is deemed to be a lunatic and is not under proper care and control, or is cruelly treated or neglected by any relative or other person having the care or charge of him, such justice shall either himself visit and examine such person and make inquiry into the matters so appearing upon such information, or by an order under his hand and seal direct and authorize some physician, surgeon, or apothecary to visit and examine such person and make such inquiry, and to report in writing to such justice his opinion thereupon; and in case upon such personal visit, examination, and inquiry by such justice, or upon the report of such physician, surgeon, or apothecary, it appear to such justice that such person is a lunatic, and is not under proper care or control, or is

made, had not been fulfilled, made the rule absolute for the writ of certiorari to bring up such order for the purpose of having it quashed.

The defendants appealed.

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cruelly treated or neglected by any relative or other person having the care or charge of him, it shall be lawful for such justice, by an order under his hand and seal, to require any constable of the parish or place, or any relieving officer or overseer of the parish where such person is alleged to be, to bring him before any two justices of the same county or borough; and the justice or justices (as the case may be) before whom any such person as aforesaid in the respective cases aforesaid is brought under this enactment, shall call to his or their assistance a physician, surgeon or apothecary, and shall examine such person, and make such inquiry relative to such person as he or they shall deem necessary; and if upon examination of such person or other proof such justice be satisfied that such person so brought before him is a lunatic, and was wandering at large, and is a proper person to be taken charge of and detained under care and treatment, or such two justices be satisfied that such person so brought before them is a lunatic and is not under proper care and control, or is cruelly treated or neglected by any person having the care or charge of him, and that he is a proper person to be taken charge of and detained under care and treatment; and if such physician, surgeon, or apothecary sign a certificate with respect to every such person so brought either before one justice or two justices according to the form in the Schedule F., No. 3, to this Act, it shall be lawful for the said justice or justices, by an order under his or their hand and seal, or hands and seals, according to the form in the Schedule F., No. 1, to this Act, to direct such person to be received into such asylum as hereinafter mentioned or, where hereinafter authorized in this behalf, into some hospital registered or house licensed for the reception of lunatics; and the said constable, relieving officer or overseer who may have brought such person before such justice or justices, or any constable whom such justice or justices may require so to do, shall forthwith convey such person to such asylum, hospital or house accordingly; provided always, that it shall be lawful for any justice, upon such information on oath as aforesaid, or upon his own knowledge and alone in the case of any such person as aforesaid wandering at large and deemed to be a lunatic, or with some other justice in any other of the cases aforesaid, to examine the person deemed to be a lunatic, at his own abode or elsewhere, and to proceed in all respects as if such person were brought before him or them as hereinbefore mentioned; provided also that it shall be lawful for the said justice or justices to suspend the execution of any such order for removing any such person as aforesaid to any asylum, hospital, or house for such period not exceeding fourteen days as he or they may deem meet, and in the meantime to give such directions or make such arrangements for the proper care and control of such person as he or they shall consider necessary; provided also that if the physician, surgeon or apothecary by whom such person is examined certify in writing that he is

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Sir F. Herschell, S.G., and *Grantham, Q.C.* (*Gore*, with them), for the appellants.

Sir H. Giffard, Q.C., and *Poland* (*Crump*, with them), for the respondent.

The arguments sufficiently appear in the judgments.

Cur. adv. vult.

May 4. The following judgments were delivered.

LORD COLERIDGE, C.J. This is a very important case, whether the amendment of the Lunacy Laws now proposed to Parliament by the Lord Chancellor be or be not passed into a statute, for the principles which it brings into discussion and the effect which our decision must have upon the practice of those who have the right to interfere with the personal liberty of alleged lunatics. I will state as accurately and as coldly as I can what are the unquestioned facts as I understand them.

Mr. Hillman is a gentleman sixty-seven years of age, who has been for many years residing in Lewes. Down to November, 1884, he had never been afflicted with any symptoms of real or supposed insanity. Towards the latter end of November, 1884, there is evidence that he conducted himself in a strange and eccentric manner in the streets of Lewes, and in his own lodgings. A relieving officer and a policeman formed the opinion that Mr. Hillman was insane, and ought to be sent to a lunatic asylum. A medical man, authorized, he does not say by whom, but certainly not by any order under the hand and seal of any magistrate, had a communication in a public library at Lewes with Mr. Hillman, which, if it was an examination, is the only *medical* examination

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not in a fit state to be removed, the removal of such person shall be suspended until the same or some other physician, surgeon or apothecary certify in writing that such person is fit to be removed; and every such physician, surgeon and apothecary is hereby required to give such last-mentioned certificate as soon as in his judgment it ought to be given, provided also that nothing herein contained shall be construed to extend to restrain or prevent any relation or friend from retaining or taking such lunatic under his own care, if such relation or friend shall satisfy the justice or justices before whom such lunatic shall be brought or the visitors of the asylum in which such lunatic is or is intended to be placed, that such lunatic will be properly taken care of."

which was held by any one at any time or place. He thereupon drew out and signed what he calls a certificate of lunacy. This certificate he handed to the two defendants, who had not at that time either of them signed any order authorizing any one to examine Mr. Hillman, nor had they seen him (to speak to) themselves. The relieving officer now, for the first time, swore his information, and in the statement made by him, which is before us, he expressly states that Mr. Hillman was neither epileptic nor dangerous to himself or others—a statement which the medical man neither qualifies nor contravenes in his certificate or affidavit. He also stated to the magistrates that Mr. Hillman's relatives declined to interfere.

In the meantime the relieving officer and the policeman had gone to Mr. Hillman's lodgings, had broken open the door of the room where he was at dinner, informed him that they had come to take him to the county lunatic asylum, and that force would be used if he resisted, and took him with them in a carriage which had been prepared, inside which with Mr. Hillman sat the policeman, and outside sat the relieving officer. On the way to the asylum Mr. Hillman thus in custody was stopped at the corner of a street in Lewes; the two defendants came to him to the door of the carriage; the interview (I state this as their own affidavit says) lasted four or five minutes; they say that they satisfied themselves that he was a lunatic, and returned to the public library. There they had some further talk with the medical man and signed the order for Mr. Hillman's reception. The carriage proceeded to the asylum. Mr. Hillman was stripped and examined and treated in all respects as a lunatic from the 24th of November to the 3rd of December. On the 3rd of December he was removed to St. Luke's Hospital, and on the 5th he was discharged. These are I believe with exact accuracy the facts of the case; and on these facts, the question is whether a certiorari should issue to quash the order of the magistrates, the two defendants, as made without jurisdiction. The Divisional Court has held that the certiorari should issue, and I am of opinion that their judgment was correct and should be affirmed.

The decision must turn upon the construction to be placed upon 16 & 17 Vict. c. 97, s. 68. This portion of the Act (I say it

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with all respect) is not happily framed. It attempts to deal in one section with two different subjects, two different states of circumstances, two different procedures; instead of dealing with one in one section and with the other in another. It is certainly a good practical illustration of the "brevis esse laboro, obscurus fio" of Horace. But with a little trouble I think its enactments may be made out with reasonable clearness. There is the "person wandering at large" "deemed to be a lunatic," there is the person "not a pauper and not wandering at large" "deemed to be a lunatic," which is the case of Mr. Hillman. Mr. Hillman is not alleged to have been a raging and dangerous lunatic. The common law always allowed the restraint of the liberty of such persons. The statute authorizes, and most properly, interference with the liberty of those who, though not dangerous as regards life or limb to themselves or others, are yet the subjects of "proper care and control." But their liberty is to be interfered with only as the statute directs. What does it direct?

1. Information on oath to a single justice. 2. Either (*a*) examination of the alleged lunatic by the justice himself, or (*b*) an order under his hand and seal directing and authorizing a medical man to visit, examine and report in writing to the justice. 3. An order under his hand and seal directing the lunatic to be brought before two justices.

In this case none of these things were done. I am of opinion that they are conditions precedent to the exercise of the jurisdiction of the magistrates, protection carefully enacted in defence of liberty; and that a person is not to use the words of the statute "brought *under this enactment*" before the two magistrates unless these conditions are fulfilled, and if not "brought under this enactment" the alleged lunatic is not subject to the jurisdiction which has been exercised in this case.

I am quite aware of the argument which has been derived from the proviso towards the close of the 68th section, and the words of it require, no doubt, careful consideration. They are as follows: "Provided always that it shall be lawful for any justice, upon such information on oath as aforesaid or upon his own knowledge, and alone, in the case of any such person as aforesaid, wandering at large and deemed to be a lunatic, or with *some other justice* in

any other of the cases aforesaid, to examine the person deemed to be a lunatic at his own abode or elsewhere, and to proceed in all respects as if such person were brought before him or them as hereinbefore mentioned." What is the procedure directed or allowed by these words? A single justice, who is authorized by the earlier part of the section "to visit and examine," may, under these words, either have a sworn information to act upon, or, if he has private or personal knowledge of his own, he may act on that, and visit and examine in any place he pleases. Two may do the same thing as to examination; but, then, one of those two justices, as I read the statute (because the words are he "*with some other justice*," implying that he, the one justice, must be one of the two), he, I say, must have either a sworn information or private and personal knowledge to act upon; so that in no case can *two* justices act unless *one* of them has *already* had, as a condition precedent to vesting the jurisdiction, either an information upon oath or private and personal knowledge of his own. I conceive, therefore, that the proceeding before or by one justice is a condition precedent to the exercise of the powers of examination given by the proviso to two, and that, though the statute allows the actual bringing before the justices for examination to be dispensed with for reasons of urgency or convenience, yet it protects the alleged lunatic by making the sworn information or the private and personal knowledge of one justice at the least the foundation of the whole jurisdiction. This appears to me to be the natural and proper construction of the proviso. I am constrained to add that any other interpretation renders the enacting part of the statute nugatory or in effect repeals it altogether; whereas this construction protects the alleged lunatic and yet makes provision for an examination elsewhere than in public, which may sometimes be most desirable. The proviso does not say, as I read it, that the conditions precedent to bringing before the justices may be dispensed with, but that when they have been fulfilled the alleged lunatic need not (I should say in cases of urgency or danger or inconvenience) be formally brought before the two justices, one of whom must be, as I have already pointed out, the one justice mentioned earlier in the section, but that they may "*proceed*" (the word is, I think, important) *as if* he were brought before them,

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i.e., I think proceed to all the *subsequent* stages of the procedure. I am, therefore, of opinion on this first point that on the true construction of the 68th section these two justices acted without jurisdiction. It is indeed manifest, if my view be correct, that the statute has been violated in its most essential provisions.

Next, I think that the statute requires that the examination of the alleged lunatic by the two justices should be in the presence of the medical man. The justices are to do or may do three things, and I think they must do them in the order in which they stand in the statute. 1. Call to their assistance a medical man. 2. Examine the person; 3. (only if they think it necessary) make further inquiry.

Now, it appears to me that the examination of an alleged lunatic is just the very portion of their duty in which, to make it safe or useful, justices will most need the aid of scientific skill, and I should expect, therefore, to find that they were ordered to avail themselves of this skill in this portion of their duty, and I seem to myself to find clearly in the statute what I should expect to find there. "Call to their assistance, and examine," means, I think, call to their assistance and with such assistance examine. The examination is imperative, and, therefore, the assistance which is to make it effective is imperative also. The further inquiry is by the terms of the statute not imperative, and as to that the assistance, which in such case might be useless, is dispensed with. I am aware how differently questions of construction are answered by different minds, but when I remember the possibly frightful consequences to an alleged lunatic of a mistaken inference from this examination by the justices I cannot persuade myself that my view of the statute is unreasonable or improbable; and if it be not, it is surely the one which a court of law should adopt. With all respect to the magistracy of this country, the great body of justices are men necessarily without the least experience of the fine and subtle shades which distinguish harmless eccentricity, strange opinion, or perversity of judgment from a lunacy which requires restraint. It may be, it very often is, that the medical man has not much more experience; but to hold that because the statute is sometimes necessarily imperfect, we should without any such necessity, make it in all cases more imperfect still, appears

to me to be contrary to true canons of construction, and very dangerous. It is in the process of the examination that the good sense of the layman and the skill of the expert are most needed to correct and supplement each other; and to divorce them, to allow the critical process of personal examination to take place separately by persons who are to concur in the result, seems to me, I own, to render useless or worse one of the most salutary provisions of the statute. If the words were clear the consideration I am about to mention could have no weight, but I am glad to learn that what I think essential is at least the usual practice of the police magistrates and of many most experienced and capable magistrates in the country. On this ground also, therefore, I think that this order was made without jurisdiction.

I have more doubt as to another point which was pressed before us, viz., that when the alleged lunatic is before the justices and being examined by them, he must know what is taking place and must have an opportunity of defence or explanation. It is no doubt a principle of law that no man is to be condemned unheard, a principle which applies also to a deprivation of liberty, except for the temporary purpose of safeguard and prevention of escape. This is recognised (if formal recognition were needed) in a number of cases which it would be mere waste of time to quote in detail. It is no doubt also a well settled rule that a statute is to be construed as far as may be in accordance with legal principles; and beyond these general principles there is much in the words of the statute itself to give support to the contention. Why, it may be asked, is the alleged lunatic to be brought before two justices if he is not to be heard? What more cruel and strange wrong can be done to a sane man than to deprive him of his liberty and shut him up with madmen upon questions put to him by two justices, the object of which he does not know, or by a medical man of whose character and calling he may be unaware? A few words of explanation or denial might make the whole difference; yet these few words, his ignorance of what is going on may prevent him from offering.

It must be remembered that the use of this hearing is exclusively, or, at least, chiefly, to be found in those doubtful cases in which a knowledge of what is going on is of the very essence of justice. The cases of raving maniacs are plain enough, and at

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least in such cases the *opportunity* for a hearing can do no harm; it is in cases, unhappily, not uncommon, where fraud and treachery are being skilfully practised against a man, that full knowledge is so essential, yet it is said that while the fraudulent relative or dishonest expert may be heard, there is no opportunity *secured by law* for a like hearing to the hapless object of the conspiracy. These considerations appear to me to be of weight; and if there be no hearing in *substance* and *sense* secured to the alleged lunatic it is a great blot on the statute. If this were the only point on which a Divisional Court had decided I should hesitate long before I differed from such a decision. But, as it is not necessary, I will express no positive opinion.

I come now to a question of fact and substance on which, though I have formed a clear opinion, I express it with regret. I am unable to hold, as matter of fact, that the examination, so to call it, made by the two defendants was a real examination or one within the meaning and intention of the statute. Mr. Hillman was in custody to the knowledge of the justices, as they do not deny; he was actually on his way to the asylum to their knowledge, as they do not deny: indeed, from the eighth paragraph of Mr. Whitfield's affidavit it is certain that they knew these facts. They had had some conversation in Mr. Hillman's absence with Dr. Crosskey, Mr. Shelley, and Mr. West, and it is to be observed that *medical* examination, in the sense of examination, into physical facts, such as temperature, digestion, pulse, tongue, and so forth, there appears to have been absolutely none. They then go down into the street and find him in a carriage with Serjeant Tucker, whom they knew, and with two other persons, and then this is the account they give; I say they, because substantially Mr. Thorne's account is the same as the account given of this so-called examination in the eighth paragraph of Mr. Whitfield's affidavit. [His Lordship here read the paragraph, which is fully set out at page 126 of this report.]

I am here, I know, speaking for myself, and I will own that the experience I have had of the flimsy stuff on which perfectly sane men are sometimes incarcerated in lunatic asylums makes me perhaps a severe critic; but I am not content to consider this sort of thing an examination under the statute. It seems to me the merest travesty of an examination, and the elaborate system of

protection and careful inquiry prescribed by the statute, if this is a legal compliance with it, is, to use old and famous words, "a mockery, a delusion, and a snare." Far better, in my judgment, to have no provision for protection at all, than provisions of which the proceedings in this case are to be held legally to satisfy.

I desire to call attention to the excellent summing up of Crompton, J., as reported in *Hall* v. *Temple* (1), especially at pp. 355, 455, and 365. That was an action against a medical man for signing a certain certificate under the Lunacy Acts without reasonable cause. Falsehood and malice, which had been alleged, were struck out of the declaration, which stood ultimately upon negligence only. If a negligent examination is actionable in the case of a medical man, it appears to me that a negligent examination is not an exercise of statutory jurisdiction in the case of justices. This case, with which I absolutely agree, shews to my mind that the statute requires that there should be a real inquiry, a real weighing and sifting of evidence, a real examination with an unbiassed mind, a real serious and solemn exercise of judgment. Here there was nothing of the kind; an unauthorized inquiry by a medical man; some statements uninvestigated and given behind Mr. Hillman's back by a relieving officer, a conversation of three or four minutes with a gentleman in custody in a carriage on his way to the asylum. Well, if this is held to satisfy the statute, and to justify, in point of law, the sending a sane man to company with madmen, I really do not know what would be held not to satisfy the statute and not to justify the sending.

I have not said, because I do not think, that the conduct of the defendants was in any way dishonest or mala fides—indeed I think there is no ground whatever for saying so. But absence of mala fides alone in the present case is not enough. The haste, the perfunctoriness, the utter, I had almost said, the ludicrous insufficiency of the examination, the place, the time, the surrounding, all seem to me to shew that the examination, if it must be called so, was not such as the statute demands, and that the judgment was not such as the statute expects.

I am not insensible to the considerations which should lead us to view with friendly eyes the exercise of jurisdiction by men in

(1) 3 Fost. & F. 337.

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the position of the defendants; nor do I forget the difficult and responsible duties which they, like other magistrates, have to discharge. But magistrates, as a rule, seek their office; it clothes them with influence and importance, it gives them authority over their fellow subjects. In the administration of the lunacy laws they have the power to take away the liberties of other men, other men to whom they are in no way directly responsible, and towards whom they are therefore bound to exercise the most wary caution. They are, as they ought to be, by law the protectors at once of the public against the mischief of uncontrolled lunatics, and the protectors of alleged lunatics against fraud or treachery, or corruption, or recklessness, or incompetence.

It seems to me that they would certainly not discharge this latter function if the conduct of the defendants in this case were a fair specimen of the conduct of justices throughout the country. I think it most important that they should know that while courts of law will uphold them in the exercise of their great powers, they will uphold them only when such exercise is serious, reasonable, and judicial.

For these reasons, as I have already said, I am of opinion that the judgment of the Court below was right, and should be affirmed.

SIR JAMES HANNEN. This is an appeal from a decision of a Divisional Court of the Queen's Bench Division, making absolute a rule nisi for a certiorari to bring up an order of two justices of the county of Sussex, for the purpose of quashing the said order, on the ground that it was made without jurisdiction.

The order in question, dated the 24th of November, 1884, states that, "the said justices having called to their assistance a surgeon, and having personally examined one Charles Hillman, who was not a pauper, and being satisfied that the said Charles Hillman was a person of unsound mind not under proper care and control, and a proper person to be taken charge of and detained under care and control, did thereby direct the medical superintendent of the Sussex Lunatic Asylum at Hayward's Heath, to receive the said Charles Hillman as a patient into the said asylum." This order was made under the 68th section of the Lunatic Asylum

Act, 1853. It is admitted that the magistrates in making this order acted in good faith, and the sole question is whether they had jurisdiction to make it.

The validity of the order is impeached on the ground that the justices did not make such an examination of the alleged lunatic as is required by the Act.

The provisions of the Act which apply to this case are as follows. By the 68th section it is enacted that "every relieving officer and overseer of any parish, who shall have knowledge that any person in such parish not a pauper, and not wandering at large is deemed to be a lunatic, and is not under proper care and control," "shall within three days after obtaining such knowledge give information upon oath to a justice." In this case Mr. Francis Shelley, the relieving officer of the Lewes Union, states that on the 24th of November he received notice from Mr. Braden that Mr. Hillman was insane, and that his family refused to take charge of him, and that their solicitor had advised him (Mr. Braden) to come to Mr. Shelley, and that he must act. Mr. Shelley then saw the two brothers of the alleged lunatic, who referred him to their cousin, Mr. Robert Hillman, for the particulars to fill up the form of statement as to the patient's religion, &c., as required by the Act, and having obtained this information, Mr. Shelley went to the magistrate's clerk's office, and asked the magistrate's clerk (Mr. West), to make arrangements for the attendance of magistrates at the Fitzroy Library, where Mr. Hillman was, so as to prevent the necessity of bringing him through the streets to the county hall. At the Fitzroy Library, Mr. Shelley met the magistrates, Mr. Whitfield and Mr. Thorne, and there swore to the correctness of the information, and further, upon oath, stated to the magistrates that Mr. Hillman was not under proper care and control, and that his relations refused to take charge of him, and that from what he, Mr. Shelley, had himself seen on the previous day he had no doubt of Mr. Hillman's madness.

It was not suggested in argument that there was any irregularity in these proceedings, or that there was anything wanting thus far to make it the duty of the magistrates to act in the matter. The sworn information of the relieving officer being thus brought to the notice of the magistrates, two courses were open to them under

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the statute—one justice might have visited the alleged lunatic and made inquiry into the matter appearing upon the information, or he might by "an order under his hand and seal have directed and authorized some physician, surgeon or apothecary to visit and examine the patient and make such inquiry and to report to the justice his opinion thereon, and if upon such personal visit, examination and inquiry by such justice, or upon the report of such physician, &c., it appeared to such justices that the person in question was a lunatic, and not under proper care and control, the justice might have required any constable or relieving officer of the parish where such person was alleged to be to bring him before any two justices of the same county." The other course which the justices might follow, and which in this case they did follow, is thus prescribed by the Act: "Provided that it shall be lawful for any justice upon such information upon oath as aforesaid or upon his own knowledge," "with some other justice to examine the person deemed to be a lunatic at his own abode or elsewhere, and to proceed in all respects as if such person was brought before them," that is, brought before them by a constable on the order of the one justice. The intention of the justices was to examine Mr. Hillman in the Fitzroy Library, but they were prevented from carrying out this intention by Mr. Hillman leaving the building by a side door. Both the justices state that their object in taking this course, instead of having Mr. Hillman brought before them, was to avoid causing him unnecessary pain and inconvenience.

The next step which is required by the Act, whether one justice orders the person deemed to be a lunatic to be brought before two justices, or the two justices themselves proceed to examine such person at his own abode or elsewhere, is thus prescribed by the 68th section: "The justices before whom any such person is brought shall call to their assistance a physician, surgeon or apothecary and shall examine such person and make such inquiry relative to such person as they shall deem necessary."

In this case the justices called to their assistance Dr. Crosskey, a medical man sworn to be of the highest character and standing. Dr. Crosskey stated to the justices that he had had a long examination of Mr. Hillman that morning, the result of which was that he

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was perfectly satisfied that he was insane and a proper person to be taken care of; he said he was incoherent in his language and excitable and had delusions, amongst others, that there was a political conspiracy against him, that the chief attendant at Saint Luke's Hospital had some plot against him, and that there was an Irish plot going on around him. Having thus consulted with Dr. Crosskey, the justices were about to examine Mr. Hillman when they were informed that he had left the Fitzroy Library. They were told by the relieving officer that Mr. Hillman had gone to get something to eat, and they were requested to wait a short time. In about ten minutes they were informed that he was in a carriage near his lodgings. The justices thereupon proceeded to the carriage in which Mr. Hillman was and personally examined him. What occurred on this occasion is thus described by Mr. Whitfield. [His Lordship here read the 8th and 9th paragraphs of Mr. Whitfield's affidavit as set out fully, ante p. 126.] Having thus examined Mr. Hillman, the justices again consulted with Dr. Crosskey, and having before them his certificate in the form required by the Act that he had personally examined Mr. Hillman, and that he was a person of unsound mind, they signed the order for his reception into the asylum. It is not suggested that either this order, the information of the relieving officer, or the certificate of the medical man is in any way defective on the face of it. The justices were therefore apparently acting within their jurisdiction in all that they have done, but it is contended that the evidence shews that they were not in fact acting within their jurisdiction, inasmuch as they did not make such an examination of the alleged lunatic as the Act requires. The objections taken to the examination are three: 1. That the justices did not make the examination in a judicial manner, that is, by giving the alleged lunatic notice of the nature of the charge made against him, and by taking evidence on oath in his presence and giving him an opportunity of meeting the charge by counter evidence.

2. That they did not examine the alleged lunatic in the presence of the medical man, and

3. That the examination was not in its nature a real one.

With regard to the first of these contentions I can find nothing in the Act to warrant it. The procedure under the Act is appli-

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cable to cases in which prompt action is required, such as the case of a person "wandering at large;" or of a person "cruelty treated or neglected by any person having the care or charge of him." It seems to me unreasonable to suppose that the Legislature by the simple word "examine" meant an inquiry not distinguishable from that upon a criminal charge or on a commission de lunatico inquirendo. It is further to be observed that, in the previous section where the care of pauper lunatics is dealt with, it is enacted that the alleged lunatic "may be examined at his own abode or elsewhere by an officiating clergyman of the parish, together with a relieving officer, who after calling a medical man to their assistance may make an order for the pauper's reception." The clergyman and the relieving officer could not hold a formal inquiry of the kind suggested, and, unless it is to be imputed to the Legislature that it was less careful of the interests of paupers than of other persons, the same interpretation must be put upon the word "examine" in the one section as in the other. The language used in the statute appears to have been specially intended to secure a personal examination by the justices of the alleged lunatic. That this the natural and obvious meaning of the word is intended is indicated by the form F. 1, where the magistrates state in terms that they have personally examined the alleged lunatic, and it would be contrary to the established rules of construction of statutes to give a wider signification to its language unless the ordinary interpretation would lead to some manifest absurdity.

The second objection is, that the justices did not examine Mr. Hillman in the presence of the medical man. It is clear that the statute does not say in terms that the justices shall make their examination together with the medical man. I can find nothing in the Act which suggests to my mind any reason why it should necessarily be a joint examination. In the first place, where the statute requires an act to be done jointly by two persons it says so, as in 61st section where two visitors are required "together" to inspect the asylum—and where it requires an act to be done by two persons separately it says so, as in the 74th section, where two medical men are required each of them "separately" to examine the alleged lunatic. I infer from the absence of any words directing either that the justices shall examine the patient with

the medical man or without him, that they may do either as circumstances may suggest to be most convenient or expedient. In some cases it would be highly unbecoming that the justices should be present when the medical man made his examination, as in the case of females suffering from uterine disease with which affections of the mind are sometimes connected. On the other hand it would frequently be useless that the justices and the medical man should examine the alleged lunatic together, as in the case of a raving maniac whose condition might not permit any questioning of him. But the ground on which my opinion on this point rests is, that the statute does not say that the justices shall examine the alleged lunatic in the presence of the medical man, and, therefore, that such a condition ought not to be imported into the Act.

The construction I put upon the 68th section is, that it requires the justices to call in an independent medical man for their assistance on the particular occasion, that is, that they are not to act on the certificate of a medical man upon whose selection they have not used their own judgment, but if they do call to their assistance a medical man for the occasion, then the requirements of the statute will be satisfied by that medical man after personal examination of the patient giving his certificate in the form prescribed by the Act. That is the assistance which the Act contemplates. After directing the justices to call in the medical man, the 68th section proceeds to enumerate the conditions upon which the justices shall make their order in these terms, "and if upon examination of such person or other proof, such two justices shall be satisfied that such person is not under proper care and control, and that he is a proper person to be taken charge of, and if such physician, &c., sign a certificate with respect to such person, it shall be lawful for the said justices by an order under their hands and seals, to direct such person to be received into such asylum."

These are all the conditions required, and they have all been complied with.

The last objection is, that the examination was not a real one, and ought to be regarded as a nullity. The perfect good faith of the justices being admitted, and the truth of their statements of the facts not being controverted, this objection resolves itself into

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this, that an examination lasting only four or five minutes cannot be valid.

The cases of the *Queen* v. *Bolton* (1), and *Ex parte Hopwood* (2), and numerous other cases decide, that the question of jurisdiction of justices depends not on the correctness of the order they may make, but on whether they had the right to enter upon the inquiry in the course of which they make the order sought to be impeached. Here it was the duty of the justices to enter upon the inquiry whether Mr. Hillman was insane. Their examination of him or other proof must satisfy them that he was so. The statute does not and cannot prescribe the amount of examination which shall bring conviction to the minds of the justices. The Act is one of general application to all cases of insanity, ranging from simple melancholia to raving mania. A very short inspection of a man struggling to injure himself or others unless restrained, would be sufficient to satisfy any one of his madness. It cannot be justly said in answer that this was not such a case, because that involves an inquiry into the merits of the case and the correctness of the conclusion arrived at by the magistrates, and the Court below as we think rightly, refused to receive further evidence on this point. The justices may have been wrong in thinking that they could judge from Mr. Hillman's manner, conversation, and general appearance that he was insane, but the law cast upon them the duty of forming an opinion, and left them to estimate the amount of examination which should satisfy them upon the point. If then I could clearly see that I should not myself have come to the same conclusion as the justices did in this case, this would not be sufficient to support the judgment appealed from, but I must add that I see no reason to suppose that the justices had not sufficient evidence to justify the opinion they formed.

There is a further objection to the validity of the justices' order relied on by Huddleston, B., which I ought not to omit to notice. He says that Dr. Crosskey was not properly called in by the justices. Speaking of Dr. Crosskey's affidavit, the learned Baron says, "he does not venture to say that he had an order under the hands and seals of the magistrates to examine him (Mr. Hillman) which was

(1) 1 Q. B. 66. (2) 15 Q. B. 121.

the only authority that he ought to, or that he could, have had." But the 68th section only requires a justice to give an order under his hand and seal directing the medical man to visit and examine where the object is to have the alleged lunatic brought by the constable before two justices, but when the two justices go to him, they are only required to call to their assistance the medical man. It is not required that this shall be done in writing. Mr. Whitfield distinctly states that he arranged with the relieving officer that Mr. Crosskey, whom he had known many years, should be called in to assist him, and the other magistrate, and both Mr. Whitfield and Mr. Thorne state that before they examined Mr. Hillman, they consulted Dr. Crosskey as to the case. I have not thought it necessary to comment on the means taken to get Mr. Hillman into the carriage, because the evidence clearly shews that the justices had nothing to do with it, and the conduct of others is not now in question.

For these reasons I am of opinion that the justices were acting within their jurisdiction in making the order complained of and, therefore, that the appeal against the judgment of the Court below must be allowed, and as the application is against magistrates, it should be with costs here and in the Court below.

LINDLEY, L.J. The question in this case is whether the two justices of the peace who made an order for the reception of Mr. Hillman into the Sussex Lunatic Asylum had jurisdiction to make such order, or whether they had not.

The order was made under the provisions of s. 68 of the Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97); and so far as form is concerned the order is free from objection; but it is alleged to be invalid on the ground that the magistrates who made it did not examine Mr. Hillman as required by the statute, before they made the order, and that they consequently had no jurisdiction to make it. It is contended on behalf of Mr. Hillman that the examination required by the statute is an examination of a judicial nature to be made by the justices in the presence of a medical gentleman and with the knowledge of the alleged lunatic, so that, if capable of appreciating what is going on, he may be in a posi-

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tion to explain his conduct and remove incorrect conclusions from what may appear to be signs of insanity. If the statute requires such an examination as this, it is admitted that no such examination took place; for when the justices examined Mr. Hillman no medical gentleman was present with them, nor did Mr. Hillman know that he was being examined in any sense or for any purpose.

In order to determine the question thus raised, it is necessary carefully to examine the provisions of the statute and to ascertain exactly what the justices actually did.

The statute deals with three classes of alleged lunatics who may be ordered by justices to be taken to lunatic asylums, viz:—

1. Alleged pauper lunatics not wandering at large, s. 67.

2. Alleged lunatics wandering at large whether pauper or not, s. 68.

3. Alleged lunatics not pauper and not wandering at large, but not under proper care and control, or who are cruelly treated, s. 68.

The statute also provides by s. 74 for the reception into lunatic asylums of persons certified to be lunatic without the order of any justice.

Mr. Hillman was not sent to an asylum under s. 74; he was sent by an order of two justices under s. 68 as a lunatic who was not a pauper and not wandering at large, but who was not under proper care and control.

Sect. 68 is very long and complicated, but the following is a short analysis of it so far as it applies to persons like Mr. Hillman.

The section is divisible into three parts. The first relates to the mode of bringing the alleged lunatic before two justices, the second relates to what they are to do when he is brought before them, the third, which is in form a proviso, is an alternative to the first part, and enables two justices to act although the alleged lunatic may not have been brought before them as provided in the first part. The short substance of these three parts is as follows:—

1. *Mode of getting him before two Justices.*

Constable &c. to give information on oath to a justice.

On such information, or on the information on oath of any person, the justice shall

either himself visit and examine such person,

or by order under his hand and seal direct a medical man to do so.

And then if it appears the person is a lunatic, the justice shall order him to be brought before two justices.

2. *What they are to do.*

And they shall

1. Call to their assistance a medical man, and
2. Examine such person, and
3. Make such inquiry as the justices shall deem necessary.

And if upon examination or other proof they are satisfied that the person is a lunatic,

And if the medical man signs a certificate in the form F. 3.

The justices may order the lunatic to be received into an asylum in form F. 1.

It is to be observed that under this part of the section no particular form or method of calling in a medical man is prescribed, nor is there any necessity for any order under the hand or seal of any justice appointing the medical man whom the two justices are to call to their assistance.

3. *The alternative to* 1.

Then comes the third part or proviso, which runs thus: "Provided always, that it shall be lawful for any justice, upon such information on oath as aforesaid, or upon his own knowledge, and alone, in the case of any such person as aforesaid wandering at large and deemed to be a lunatic, or with some other justice, in any other of the cases aforesaid, to examine the person deemed to be a lunatic, at his own abode or elsewhere, and to proceed in all respects as if such person were brought before him or them as hereinbefore mentioned."

Under this proviso one justice may act in a case like Mr. Hillman's on information on oath, or on his own knowledge, but with some other justice, as if the alleged lunatic had been brought before them as provided in Part I. In other words, the procedure in Part I. is dispensed with, and two justices may on information

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on oath, or on the knowledge of one of them, proceed as directed in Part II.

There is no necessity in this case even for any information on oath if one justice is in a position to act on his own knowledge, nor is there any necessity for any order under any justice's hand and seal directing any medical man to visit and examine the alleged lunatic. As regards the appointment of a medical man, all that is required is that the two justices shall call to their assistance a medical man, no particular form being prescribed. The justices are not to act on a certificate signed by a medical man of whom they know nothing; he must be a person approved by them and called in by them to their own assistance. The form of the certificate which the medical man is required to sign, F. 3, shews that he is also personally to examine the alleged lunatic. The two justices must also examine him. There is, however, nothing (beyond the expression, "call, &c., and examine") either in the statute or in the forms to shew that the medical man called in must examine the alleged lunatic in the presence of the justices; nor to shew that it is obligatory on the justices to examine the alleged lunatic in the presence of their medical assistant. On these points the Act is silent; and it appears to me that this matter is left to the discretion of the justices. It is obvious that it must frequently be desirable for the medical assistant to examine the alleged lunatic in private, and it is clear, I think, that such an examination, although not required, is permitted by the statute. So it is obvious that it may often happen that an examination by two justices in the presence of their assistant may be quite unnecessary, and as the statute does not in terms require such an examination, I see no sufficient grounds for insisting on it in all cases. The protection given by the statute to alleged lunatics, whether sane or insane, is, first, an examination by a competent medical man called in by the justices to assist them; and, secondly, an examination by them themselves; and I cannot find either in the language of the statute or in the nature of the case any necessity or legal justification for holding that the justices' order is null and void simply because their medical assistant is not actually present when they themselves see and examine the alleged lunatic. If they desire

his presence then they are entitled to have it; but if they do not require his attendance at that moment, I can find nothing in the statute which makes such attendance imperative. Nor do I see that general considerations of expedience require so strict a construction to be put on the words of the statute. Full effect can be given to them without engrafting on them anything not to be found in them.

I cannot help thinking that if the legislature had intended to make an examination by the justices in the presence of their medical assistant an essential condition of the justices' jurisdiction, the legislature would have said so in clear and unmistakeable terms. It has not done so. The other inquiries which the justices are to make if they think necessary can hardly be required to be made in the presence of their medical assistant, although he might in many cases suggest them. This circumstance affords an argument, though I admit a slight one, against requiring the examination to be in his presence, for the language is the same in both cases.

I pass now to the next point, and consider whether the examination by the justices must be made in such a way as to afford the alleged lunatic an opportunity of explaining his conduct and the appearances against him. This, in my opinion, is a far more important and difficult point than that to which I have already adverted; but I have arrived at the conclusion that it is not necessary under the statute with which we have to deal.

My reasons for this conclusion are as follows:—There is no trace in the statute of any difference in this respect between the various classes of lunatics with which it deals. Nothing approaching a judicial inquiry is requisite under s. 74; and the provision in s. 67 for examination of pauper lunatics by a clergyman and relieving officer or overseer of the poor shews to demonstration that in those cases anything like a judicial inquiry is quite out of the question. Moreover, the language of s. 68 does not point to anything like such an investigation as takes place under a writ de lunatico inquirendo. The object of the statute is not to enable justices to adjudicate a person to be non compos mentis, but to enable them to place under proper care and control persons whom they are satisfied are lunatic and require to be so placed.

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They have to act in cases of emergency and of great danger, as well as in other cases; their measures are precautionary measures only; if they make a mistake, it can soon be corrected: see s. 79. Moreover it must never be forgotten, in dealing with the insane, that the whole object of such an examination as justices could be expected to make would frequently be frustrated by informing the insane person that justices were about to examine him with reference to his insanity. The statute has given justices of the peace and medical men large powers; but the statute is based upon the theory that they can be trusted; and it appears to me that the time and place and manner of making the examination which they are required to make are all left to their discretion.

The kind of examination which the justices are to make is not defined by the statute; it need not even satisfy them that the person examined is a lunatic. They must be satisfied of that fact; but their own examination may not be sufficient for the purpose, hence the introduction of the words "or other proof." They must be satisfied by examination or other proof: if satisfied by their own examination, no further proof is necessary; but if their own examination is not sufficient to satisfy them, they must obtain other proof. An examination which is made as a mere form, i.e., not bonâ fide for the purpose of information and guidance, would not be an examination such as the Act requires; and such an examination might and ought to be treated as a sham, and as no examination at all. But, provided an examination be made by two justices bonâ fide for the purpose of satisfying themselves of the sanity or insanity of the person examined, such examination is sufficient to enable the magistrates to make an order for his confinement if they are satisfied by such examination or other proof of his insanity, and if they have in other respects complied with the statute. The justices cannot be considered as having acted without jurisdiction by reason only of their having made a less full and complete examination than the Court may think they ought to have made.

For the reasons above stated, the conclusion at which I have arrived is that the only conditions essential to the exercise by justices of their jurisdiction under the statute in question, are those expressly mentioned in the statute itself. Those conditions

are:—1, information on oath or knowledge on the part of one justice; 2, personal examination by the two justices of the alleged lunatic; 3, personal satisfaction that he is a lunatic; 4, such satisfaction being arrived at after their own examination and after calling to their assistance a medical man, and making such other inquiries, if any, as they may think necessary; 5th and lastly, their medical assistant must himself examine the alleged lunatic and give the certificate required by the statute.

Having now ascertained what the statute requires to be done, let us see what in fact was done; and in what respects, if any, the justices acted improperly.

According to Mr. Hillman's affidavit he was spoken to by Dr. Crosskey but was not examined by him. He was afterwards seen by two justices through a glass door in the Lewes public library, and afterwards in the carriage when on his way to the lunatic asylum, but was not examined by them. A Mr. Keeble, the managing clerk to Mr. Hillman's solicitors, made an affidavit stating, amongst other things, that he was told by Shelley, the relieving officer, that he went for Dr. Crosskey and got him to see Mr. Hillman and give the certificate, that then Shelley went with the certificate to the magistrate's clerk, and swore the usual information; that then, two magistrates having been found, he, Shelley, went with them to the library where Hillman was; that the order for Mr. Hillman's confinement was made directly after the magistrates had seen him through the glass door in the library, and before he was arrested, and without any further examination by them; and that he was arrested and taken to the lunatic asylum pursuant to such order.

Now if the facts had been as represented in these affidavits, I should be clearly of opinion that the provisions of the statute had not been complied with. But the affidavits filed on behalf of the magistrates shew a very different state of things. From these affidavits it appears—

1. That Dr. Crosskey was requested to examine Mr. Hillman with the approval of Mr. Whitfield, one of the magistrates, and in order to assist him and his brother magistrate.

2. That Dr. Crosskey saw Mr. Hillman in the public library,

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conversed with him for twenty minutes or half an hour, satisfied himself of his insanity, and shortly afterwards wrote and signed the certificate.

3. That Mr. Whitfield and his brother magistrate, being informed that Dr. Crosskey had examined Mr. Hillman, and that he was at the library, went there to examine him, but did not then do so. He appears to have left the library as they arrived; for Mr. Whitfield did not see him at all, and Mr. Thorne only saw him through a glass door, and then only for a moment.

4. That Shelley *then* swore his information, and made a further statement on oath as to Mr. Hillman's insanity, and the refusal of his friends to take care of him.

5. That the magistrates then consulted Dr. Crosskey, who was present, and was informed by him that he had that morning examined Mr. Hillman, and was satisfied he was insane. They then received from him the certificate he had signed.

6. That the magistrates, having ascertained that Mr. Hillman had left the library, waited for him.

7. That they were shortly afterwards informed that he was in a carriage below, and they went and saw and spoke to him there in the presence of Tucker, a policeman, and another man, and satisfied themselves that Mr. Hillman was out of his mind.

8. That the magistrates then returned to the library, had a further consultation with Dr. Crosskey, and then, and not before, signed the order for Mr. Hillman's removal to the asylum.

9. That Mr. Whitfield had known Mr. Hillman for forty years, and had been on friendly terms with him. Mr. Thorne, the other magistrate, had also known him some time, and had been on friendly terms with him, and both magistrates were so struck with his appearance and conversation in the carriage as to have had no doubt of his insanity.

10. That the only reason why the magistrates did not have Mr. Hillman brought before them in the county hall, or in the room where they were waiting, was to avoid causing him pain and inconvenience, he being well known in Lewes.

I pass over for the present the evidence as to how Mr. Hillman was got into the carriage. The magistrates deny that they

ordered him to be arrested, or to be got into the carriage, or to be brought to them; and this part of the case cannot, in my opinion, affect the validity of the order they made for his removal to the asylum.

The affidavits filed on behalf of the magistrates appear to me trustworthy, and I accept them as giving a correct version of their conduct in this matter.

Taking this view of the evidence, I am of opinion that all the conditions required by the statute were complied with in the present case. There was an information on oath; the magistrates consulted a proper medical man approved by themselves; he himself examined Mr. Hillman, and signed a certificate as required by the statute; the magistrates saw and examined Mr. Hillman themselves, and were satisfied of Mr. Hillman's insanity; they then again consulted their medical adviser, and then, and not before, they gave an order for Mr. Hillman's reception into the county lunatic asylum. It seems to me, therefore, that it is impossible to say that the order so made was without jurisdiction, and ought to be quashed.

Before concluding I wish to add that, in my opinion, proceedings of this kind cannot be too narrowly watched, and that not only magistrates and medical men, but also every one concerned in causing a person to be sent to a lunatic asylum, ought to be extremely careful to avoid even the appearance of haste or impropriety.

I feel very strongly that Mr. Hillman has much to complain of as regards the mode in which he was got into or induced to enter the carriage in which he was taken to the asylum; and if the justices had been in any way parties to that proceeding I should have looked with very grave suspicion on the bona fides of their examination of him when in the carriage. But their affidavits satisfy me that they had nothing whatever to do with Mr. Hillman's arrest; and that to say that they examined him when already on the way to the asylum, is to say that which, though true in a sense, is not true if what is meant is that the justices had made up their minds to send him there before they themselves had seen him, and regardless of the opinion they might

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form after seeing him. Mr. Hillman was got into the carriage by the relieving officer and the policeman in the expectation that the justices would make an order authorizing him to be taken to the asylum; but he was not in any accurate sense being taken there before their order had been obtained. The fact however remains that he was improperly got into the carriage, and he did not get out of it until he arrived at the asylum, and that the magistrates' examination of him consisted of a view of him and a talk with him whilst in the carriage. Such proceedings cannot be approved; but it is one thing to disapprove of them and another to hold judicially that the order of the justices was made without jurisdiction. I am unable to come to that conclusion, and am of opinion that the appeal ought to be allowed, and that the order of the Divisional Court ought to be discharged with costs here and below.

Appeal allowed.

Solicitors for appellants: *Palmer & Bull, for Gell, Drake & Lee, Lewes.*

Solicitors for respondent: *Wynne Baxter, Rand & Meade.*

W. P.

1884
Dec. 16.

[IN THE COURT OF APPEAL.]

GARDNER & SONS *v.* TRECHMANN.

Ship—Charterparty—Bill of Lading—Freight—Incorporation of Conditions of Charterparty in Bill of Lading—Lien.

A charterparty contained a stipulation in the usual form for payment of freight at the rate of 1*l.* 11*s.* 3*d.* per ton; it also contained a clause that the shipowner should have "an absolute lien on the cargo for freight, dead freight, demurrage, lighterage at port of discharge, and average;" and a further clause that the captain was to sign bills of lading at any rate of freight; "but should the total freight as per bills of lading be under the amount estimated to be earned by this charter, the captain to demand payment of any difference in advance." Certain goods were put on board the chartered ship, and were made deliverable to the plaintiffs (who were not the charterers) by a bill of lading, whereby freight was made payable at 22*s.* 6*d.* per ton: the bill of lading contained also a clause, whereby it was provided that extra expenses should be borne by the receivers and "other conditions as per charterparty." Upon the arrival of the ship at the port of discharge the defendant, who was the shipowner, claimed and compelled payment of freight at the rate mentioned in the charterparty. The plaintiffs having sued to recover back the difference between

the freight as specified in the charterparty and the freight as specified in the bill of lading:—

Held, that the bill of lading did not incorporate the stipulation in the charterparty as to the payment of freight, that no right of lien existed for the freight mentioned in the charterparty, and that the plaintiffs were entitled to delivery of the goods upon payment of the freight specified in the bill of lading.

THE plaintiffs were timber merchants, carrying on business at Bootle, near Liverpool, and the defendant was the owner of the British iron steamship *Amanda*, and resided at West Hartlepool.

By a charterparty dated the 23rd of July, 1883, and made between the defendant and Berthold, Smith, & Co. of Taganrog, it was agreed that the *Amanda* should proceed to a safe port in the sea of Azoff and there load a full and complete cargo of wheat, $\frac{\text{and}}{\text{or}}$ seed, $\frac{\text{and}}{\text{or}}$ grain, $\frac{\text{and}}{\text{or}}$ tallow, $\frac{\text{and}}{\text{or}}$ other stowage goods at the option of the freighters to a safe port in the United Kingdom on being paid freight at the rate of 1*l.* 11*s.* 3*d.* per ton. By the 16th clause "the freighters' liability on this charter to cease when the cargo is shipped (provided the same is worth the freight, dead freight, and demurrage on arrival at port of discharge), the owner or his agent having an absolute lien on the cargo for freight, dead freight, demurrage, lighterage at port of discharge, and average." The charterparty contained also this clause: "It is further agreed the captain to sign bills of lading as presented and at any rate of freight, but should the total freight as per bills of lading be under the amount estimated to be earned by this charter, the captain to demand payment of any difference in advance; on the other hand, any difference in excess of chartered freight to be deducted by charterers' agents at port of discharge." The *Amanda* accordingly proceeded to Taganrog, and there shipped a cargo. By a bill of lading, signed by her captain, and dated the 13th of August, 1884, about 750 tons of boxwood (part of the *Amanda's* cargo) were made deliverable unto the plaintiffs, "freight for the said goods payable on delivery at the rate of twenty-two shillings and sixpence (22*s.* 6*d.*) per ton of 2240 lbs. delivered, immediately in cash, without discount, with average accustomed." The bill of lading contained the following clause: "All extra expenses in discharging to be borne by receivers, and other conditions as per charterparty, dated the

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23rd of July, 1883." The *Amanda* proceeded upon her voyage, and arrived at Liverpool. Upon discharging her cargo the defendant claimed payment of freight at the rate specified in the charterparty, but the plaintiffs contended that freight was payable only at the rate mentioned in the bill of lading. Accordingly the defendant caused a portion of the cargo deliverable to the plaintiffs under their bill of lading to be detained under the Mersey Docks Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), ss. 193, 194, in order to enforce payment by the plaintiffs of freight at the rate specified in the charterparty; and in order to obtain the delivery of this portion of the cargo, the plaintiffs were compelled to pay a sum of about 99*l.* beyond the amount of freight due under the bill of lading, and they sought in this action to recover back 99*l.*

The action was tried before Baggallay, L.J., at Liverpool, when judgment was given for the defendant.

The plaintiffs appealed.

Gorell Barnes, for the plaintiffs. The rate of freight mentioned in the bill of lading is different from that set forth in the charterparty, and the question is whether the charterparty overrides the bill of lading. The defendant is a shipowner who claims to detain for the freight mentioned in the charterparty; the plaintiffs insist on the delivery of the cargo upon payment of freight according to the bill of lading. For the plaintiffs it will be contended that the clauses in the bill of lading incorporating the terms of the charterparty must be construed strictly. The authorities commence with *Chappell* v. *Comfort* (1), but no case is precisely in point. *Porteus* v. *Watney* (2) is not against the plaintiffs: the decision turned upon the special words in the bill of lading. At the trial Baggallay, L.J., relied upon *Gray* v. *Carr* (3), but it does not govern this case. *Gullischen* v. *Stewart* (4) appears to be the only case upon the question since *Gray* v. *Carr* (3); and it shews that where a charterparty and a bill of lading differ, the bill of lading must prevail. The defendant had no lien which entitled him to detain the plaintiffs' goods.

(1) 10 C. B. (N.S.) 802.
(2) 3 Q. B. D. 227, 534.
(3) Law Rep. 6 Q. B. 522.
(4) 13 Q. B. D. 317.

French, for the defendant. *Gullischen* v. *Stewart* (1) is distinguishable. In that case it was held that the consignees of the cargo were not protected by the charterparty; here it is the consignees of the cargo who are seeking to enforce the provisions of the bill of lading against the shipowner.

[LINDLEY, L.J. It appears to follow from *Fry* v. *Chartered Mercantile Bank of India* (2) that the bill of lading must be taken to be the governing document.

BRETT, M.R. Is it not the result of the decisions that a general reference to the terms of a charterparty incorporates only such provisions as are consistent with the contract in the bill of lading?]

The decisions have not gone that length.

[LINDLEY, L.J. The stipulation as to freight in the bill of lading is inconsistent with the stipulation as to freight in the charterparty.]

Gorell Barnes was not heard in reply.

BRETT, M.R. The plaintiffs have shipped goods to be brought to England. The shipowner claims a right of lien for the difference between the freight payable under the bill of lading, and that payable according to the charterparty.

In the first place, I am of opinion that the charterparty gave no right of lien for that difference; the excess of the amount estimated to be earned by the charterparty over the freight payable under the bills of lading was to be paid immediately before the ship sailed; it was to be demanded by the captain; the shipowner had no right of lien for that excess even against the charterer; the stipulation was a mere reservation of a right which the shipowner could not enforce by lien.

Secondly, if the right of lien ever existed, it was ousted by the terms of the bill of lading. There are many cases as to what is brought into the bill of lading by this general reference to the charterparty. It brings in only those clauses of the charterparty which are applicable to the contract contained in the bill of lading; and those clauses of the charterparty cannot be brought in which would alter the express stipulations in the bill of lading: here

(1) 13 Q. B. D. 317. (2) Law Rep. 1 C. P. 689.

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there is an express stipulation that the goods shipped are to be delivered on payment of a specific amount of freight; and this sum is fixed upon without allusion to any other amount of freight. The general reference to the charterparty would bring in a lien for demurrage; but it does not allow a lien to be brought in as to the freight payable under the charterparty.

These questions are very difficult to decide, and it is easy to understand how the Lord Justice came to a conclusion in favour of the defendant: nevertheless we feel compelled to differ from him.

COTTON, L.J. I am of the same opinion. The question before us depends upon the construction of two documents. The goods were received on board, and by the terms of the bill of lading freight was payable at a prescribed rate on delivery thereof. It seems to me that the shipowner cannot retain all the cargo on account of a claim for freight: freight is payable on that which is actually delivered. The amount of freight payable under the bill of lading is considerably less than that payable under the charterparty; and we have to consider for which amount the plaintiffs were liable upon the construction of these documents. When there is no express provision in the bill of lading, the contract is to be regulated by the terms of the charterparty. Is the clause in the charterparty which gave a right of lien, introduced as to the freight payable under the charterparty by the words: "other conditions as per charterparty"? I think not. It is provided that the charterparty shall govern the contract except as to the freight and extra expenses. This construction saves and takes in most of the clauses of the charterparty; but it does not take in the clause of lien as to the charterparty freight. The shipowner might perhaps have had a lien for the freight in the bill of lading, but not for the freight mentioned in the charterparty.

LINDLEY, L.J. I am of the same opinion. The whole difficulty arises from the captain's omission to enforce on behalf of the shipowner the clause as to demanding payment of the difference between the freight due under the bills of lading and the freight estimated to be earned by the charterparty. The bill of lading is

the contract for the conveyance of goods. It has been contended that the consignees of the cargo under the bill of lading must pay the whole of the freight due by the charterparty; is that a term consistent with the bill of lading? Certainly I am of opinion that it is not consistent: the two clauses as to the payment of freight cannot stand together. It is no answer to say that the bill of lading incorporates the conditions of the charterparty: only those conditions are incorporated which are consistent with the contract in the bill of lading.

I am also of opinion that there can be no lien for what is contracted to be paid in advance. The judgment of Baggallay, L.J., must be reversed and entered for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Field, Roscoe, & Co., for Bateson, Bright, & Warr, Liverpool.*

Solicitors for defendant: *Turnbull, Tilly, & Mousir, for Turnbull & Tilly, West Hartlepool.*

J. E. H.

IN RE HEWITT. EX PARTE HANNAH AND WALTER HEWITT.

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May 19.

Bankruptcy—Administration in Bankruptcy of Estate of Person dying Insolvent—Discovery of Debtor's Property—Power to summon Person to be examined—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 27, 125. *Rule* 58 (*Bankruptcy Rules*, 1883).

The provisions of s. 27 of the Bankruptcy Act, 1883, do not apply to an administration of the estate of a person dying insolvent under s. 125 of the Act.

There is no power in cases of such administration, either under s. 27 or under rule 58 (Bankruptcy Rules, 1883), to summon a person to be examined for the purpose of discovery of the deceased debtor's estate.

APPEAL from an order of a county court committing the appellants, Hannah and Walter Hewitt, for contempt.

The facts were as follows:—

An order for the administration in bankruptcy of the estate of one Richard Hewitt, deceased, had been made under the 125th section of the Bankruptcy Act, 1883, upon the application of creditors. The official receiver, as trustee of the estate, applied

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to the county court having jurisdiction in the matter of the administration for an order for the examination on oath before the Court of the appellant Hannah Hewitt, the widow and executrix of the deceased, and the appellant Walter Hewitt, his son, upon the grounds that they were capable of giving information respecting the property of the deceased, and that such examination was necessary for the purposes of justice and for the discovery of the said deceased's property. It was ordered by the county court upon such application that the appellants should attend before the Court on a certain day to be examined on oath in the matter. The appellants not obeying this order, the order for their committal for contempt was applied for and obtained.

Herbert Reed, for the appellants. There is no power given by the Bankruptcy Act, 1883, to summon persons to be examined for the purpose of discovery of the estate in the case of administration of the estates of persons dying insolvent under s. 125. The 27th section of the Act is the section that gives power to summon persons who are supposed to be able to give information as to the estate of a bankrupt. The 125th section expressly incorporates the third part of the Act, but the 27th section is not included in that part of the Act. The language of the 27th section is not applicable to cases within s. 125, because the power given by the 27th section is only to be exercised after the making of a receiving order. The order to be made under s. 125 is not a receiving order, but an order for administration of the estate of the deceased debtor. By sub-s. 11 of s. 125 power is given to make general rules for carrying into effect the provisions of the section in the same manner and to the like effect and extent as in bankruptcy.

It is submitted that the intention is that s. 125 and the provisions incorporated thereby, and the rules to be made thereunder, shall constitute a complete and separate code for the administration of estates under that section. It is clear according to the usual rule of construction that certain provisions of the Bankruptcy Act being expressly incorporated by s. 125, the rest of the Act is excluded. It was held in *Ex parte Willey* (1), under the

(1) 23 Ch. D. 118.

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Bankruptcy Act, 1869, that the provisions of that Act analogous to those of s. 27 of the present Act were confined to bankruptcies proper, and did not extend to compositions.

It is submitted that rule 58 of the Bankruptcy Rules, 1883, cannot extend the power of examining persons for the purposes of discovery given by the Act. It is expressly provided by the 4th sub-section of the 127th section that the rules shall not extend the jurisdiction of the Court. Therefore, if the rule did extend the power given by the Act, it would be ultrà vires. But upon the true construction of rule 58 it does not apply to the examination of persons for the purposes of discovery of the estate of the debtor. It is similar in its terms to Order XXXVII., r. 5, of the Rules of the Supreme Court, 1883, and like that rule provides merely for taking the deposition of a witness to be used in evidence instead of his oral testimony, in cases where such testimony would ordinarily be required.

[He cited *Warner* v. *Mosses*. (1)]

Muir Mackenzie, for the official receiver. It is contended, first, that there was power to make the order for the examination of the appellants under rule 58. By the 2nd sub-section of s. 125 of the Bankruptcy Act, 1883, it is provided that the Court may make an order for the administration of the estate of a person dying insolvent in bankruptcy, and by sub-s. 5 the official receiver is to be trustee of the estate, and to realise and distribute the same in accordance with the provisions of the Act, that is to say, as in bankruptcy. By sub-s. 11 there is power given to make general rules in the same manner as in bankruptcy, and it is submitted that the general rules made with regard to bankruptcy are applicable, so far as they can be applied in the nature of things, to cases within s. 125. Rule 58 gives a general power of causing a witness to be examined before the Court or any officer of the Court, or any other person, whenever the justice of the case requires it. The rule merely gives to the Bankruptcy Court, in relation to bankruptcy matters, the same power as is given to the High Court, of which it is a part, by Order XXXVII., r. 5, and therefore it can hardly be said that the rule extends the jurisdiction of the Court so as to be ultrà vires. It is not denied

(1) 16 Ch. D. 100.

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that the object of the application was to obtain discovery of the estate, but the order was made in the very terms of rule 58, and therefore it cannot be that there was no jurisdiction to make the order. It might be a different question if, when the witnesses attended for examination, they refused to answer questions relating to the discovery of the estate.

Secondly, it is contended that s. 27 applies to this case. The obvious intention of the 125th section is to put the administration of the estate of the deceased insolvent on the same footing as that of the estate of a bankrupt. The estate is to be realized and distributed as in bankruptcy. The only difficulty arises from the reference in s. 27 to the receiving order, but it is submitted that for this purpose the order for administration is equivalent to a receiving order.

Herbert Reed, in reply.

CAVE, J. In this case an order was made for the administration of the estate of the deceased, Richard Hewitt, in bankruptcy under s. 125 of the Bankruptcy Act, 1883. That order having been made, the official receiver applied for an order that the executrix and the son of the deceased should attend to be examined upon oath. The learned judge of the county court made an order accordingly, and subsequently made an order for the committal of the proposed witnesses for not attending for examination. The question now is, whether he had jurisdiction to make that order. It is contended, first, that he had such jurisdiction under rule 58 of the Bankruptcy Rules, 1883; and, secondly, that, if that be not so, he had such jurisdiction under s. 27 of the Bankruptcy Act, 1883. As I gather, the order was in fact intended to be made under rule 58, that being the rule which the learned judge thought applicable. Rule 58 provides that the Court may in any matter, where it shall appear necessary for the purposes of justice, make an order for the examination on oath before the Court, or any officer of the Court, or any other person, and at any place, of any witness or person, and may empower any party to any such matter to give such deposition in evidence therein on such terms (if any) as the Court may direct. That provision corresponds with the provision made by

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Order XXXVII., r. 5 (Rules of the Supreme Court, 1883). It is now contended that rule 58 empowers the Court, in a case where there is no contentious litigation in progress, to order any person to attend and be examined for the purpose of discovery. I am of opinion that the rule has not such an operation. Upon consideration of Order XXXVII., r. 5, it will be found to form part of an order not relating to "discovery" but to "evidence generally." The provisions with regard to discovery are to be found in Order XXXI., and it may be observed that discovery under those provisions is to be obtained from the parties to the litigation only. When the provisions of Order XXXVII., which is headed "Evidence generally," are looked at, it will be found that rule 1 provides in effect that witnesses at the trial of any action or at any assessment of damages shall be examined vivâ voce and in open Court, as a general rule, subject to certain exceptions: and then, after certain intervening rules relating to evidence, rule 5 provides for the case where it is thought necessary for the purposes of justice that evidence should be given otherwise than vivâ voce, viz., by taking the examination of the witness otherwise than at the trial, and allowing the deposition so taken to be afterwards given in evidence. It is impossible, as it seems to me, to avoid seeing that this provision applies only to the examination of witnesses in matters where there is a pending litigation between contesting parties. The whole scope of the order is confined to cases where testimony is to be obtained for the purposes of an action or matter analogous thereto, between litigating parties. That this is so is clearly shewn by the part of the order relating to perpetuation of testimony. If there could be a case in which it might appear permissible to examine witnesses for the purpose of discovery, though no litigation were actually pending, the case where the perpetuation of testimony becomes necessary would seem to be one; but it is provided by Order XXXVII., r. 37, that witnesses shall not be summoned to perpetuate testimony unless an action has been commenced for the purpose. In the case of *Warner* v. *Mosses* (1), Jessel, M.R., in dealing with Order XXXVII., r. 4 (Rules of Court, 1875), said: "I do not intend to cut down the generality of its terms,

(1) 16 Ch. D. 100.

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but it is confined to cases in which it appears to be 'necessary for the purposes of justice.' Now it cannot be necessary for the purposes of justice to examine witnesses before the trial who can attend at the trial, and accordingly this rule of the order has been used in the cases mentioned in Mr. Wilson's book, where witnesses are going abroad, or from age, or illness, or other infirmity, are likely to be unable to attend the trial, and then they are examined de bene esse in the usual way: but to have such an order you must have evidence that the witness cannot attend at the trial." It is to be observed that the Master of the Rolls does not suggest that there can be any case where it may be necessary for the purposes of justice within the meaning of the rule to examine a witness, unless there is a litigation and a trial in contemplation. He proceeds further on to say: "I am not aware of any case where it can be necessary for the purposes of justice that witnesses should be examined ex parte." That is exactly what, according to the contention, should be done here. So much for the view that was taken by the Master of the Rolls with regard to the effect of a rule which is precisely similar to the existing rule, so far as the terms of the two rules are material to the present question. I say precisely similar, because the power now given to order the examination to be taken before the Court or a judge, as well as before an officer of the Court or other person, cannot, as it seems to me, alter the construction of the rule with regard to its general scope. To the same effect were the observations of the Master of the Rolls in *Ex parte Willey*. (1) Speaking there of the power given by s. 96 of the Bankruptcy Act, 1869, he says: "It is a power not to summon a man as a witness, but to summon him for the purpose of discovery, and he is treated in a totally different way from a witness. It is framed with a different view from that of compelling a man to give testimony. It is not testimony, but discovery emphatically which is its object. Now that is a very grave power to entrust to any Court or any man, viz., power to summon any other man whom you suspect (for mere suspicion will do) to be capable of giving information and to get any information from him, although that information may be extremely hostile to the interests of the man himself. It

(1) 23 Ch. D. 118.

is a power which, so far as I know, is found nowhere except in bankruptcy and the winding-up of companies, which is a kind of bankruptcy: it is a very extraordinary power indeed, and it ought to be very carefully exercised." It would be very remarkable that the Master of the Rolls should use this language with regard to the power given by s. 96 of the Bankruptcy Act, 1869, if at this very time, as contended for in argument, there was in existence an order which had given this power of discovery to the High Court in all matters. I think the considerations I have mentioned are quite sufficient to dispose of the contention that this power can be exercised under rule 58. As I understand it, rule 58 was framed for an entirely different purpose: viz., for the purpose of procuring beforehand, where justice requires it, that evidence which, under ordinary circumstances, would be given vivâ voce at a trial or hearing of a cause or matter; and, as it appears to me, the power given by the rule exists only where there is a litigation and litigating parties, and it contemplates an occasion on which there is an opportunity of cross-examination of the witness by the other side, and not an ex parte examination. It may be further observed that, if this rule had the application contended for, the provisions of s. 27 of the Bankruptcy Act would have no reason for existence.

Secondly, it is contended that there was power to make this order under s. 27. This question depends primarily on the language of s. 125. The 6th sub-section of that section applies with the modifications after mentioned all the provisions of Part III. of the Act relating to the administration of the property of a bankrupt so far as the same are applicable. There is therefore an express enactment that the provisions of Part III. with certain modifications shall apply to the administration in bankruptcy of the estate of a person dying insolvent. The terms of sub-s. 5 cannot, as it seems to me, be relied upon as extending the provisions of sub-s. 6. That sub-section provides that, upon an order being made for the administration of a deceased debtor's estate, the property of the debtor shall vest in the official receiver of the Court as trustee thereof, and he shall forthwith proceed to realize and distribute the same in accordance with the provisions of the Act. The provisions of the Act as to the realization and distri-

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bution of estates form portions of Part III. Part III. is headed, "Administration of Property," and includes ss. 37 to 65; the sections relating to "realization of property" are ss. 50 to 57; and the sections relating to "distribution of property" are ss. 58 to 65. So that really sub-s. 6 extends the provisions of sub-s. 5 by incorporating the whole of Part III. of the Act. Sect. 27 is not included in Part III. of the Act. That section provides that the Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it for the purposes of examination the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the Court may deem capable of giving information respecting the debtor, his dealings, or property. Undoubtedly in cases within the section a person may be summoned and compelled to give testimony, though there is no litigation and no litigating parties; in point of fact to make discovery.

Now s. 125 certainly does not expressly apply s. 27 to cases of administration under its provisions; nor can I see that it does so by implication. Applying the same principle as was applied in *Ex parte Willey* (1) to a similar provision, and having regard to the words actually used in the section, I cannot come to the conclusion that the provisions of s. 27 are rendered applicable to cases within s. 125. It might, no doubt, be very convenient that there should be this power, in the sense that it might be very advantageous to the creditors of the deceased debtor, but we have to see not merely whether it would be convenient, but whether the legislature have said, either expressly or by necessary implication, that there shall be this power. It seems to me clear that they have not said so. They might in framing s. 125 have provided in terms that s. 27 should apply. They have not so provided; nor have they said that for the purposes of the section an administration order shall be considered as equivalent to a receiving order, or that "a person known or suspected to have in his possession any of the estate of the debtor" shall mean a person known or suspected to have in his possession any of the estate of

(1) 23 Ch. D. 118.

the deceased debtor. It seems to me that under these circumstances, if we held the power given by s. 27 to be applicable, we should be legislating rather than interpreting the Act. For these reasons I am of opinion that this order cannot be supported.

WILLS, J. I have come to the same conclusion, and I have not much to add to what has been said by my Brother Cave. It seems to me that it may be convenient if I approach the case in the reverse order from that which he has adopted, and consider first what the Act has said, and that so light may be thrown on the true construction of the rule which is ancillary to the Act.

Now, by sub-s. 6 of s. 125, the legislature has specifically pointed out certain sections of the Bankruptcy Act which are to be applied to the administration of the estates of persons dying insolvent. According to the ordinary rule of interpretation, unless there are strong reasons to the contrary, when they provide that the provisions of Part III. shall be applicable, they must be considered to mean that other parts of the Act shall not be applicable. It is contended that there are strong reasons why this almost universal canon of construction is not applicable. It is said that the 5th sub-section provides that the official receiver shall realize and distribute the estate in accordance with the provisions of the Act, and it is suggested that the effect of this language is to render applicable provisions of the Act other than those contained in Part III. But, when we come to look at the Act, we find that there are two groups of sections headed "Realization of Property," and "Distribution of Property," which are both included in Part III., and it seems clear that the 5th sub-section only meant to speak of realizing and distributing the estate in such a sense as would be consistent with the next sub-section, which incorporates the provisions so headed. If so, there is no reason afforded by the use of the language referred to why any other provisions than those of Part III. should be applicable to the administration of estates under s. 125. When we look at s. 27, it is obvious that it could only be applied by the rejection of some of the material words of the section. The power given by that section is only to arise "after a receiving order has been made against a debtor." It is impossible in applying the

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provision to cases within s. 125 to satisfy these words. It is said that the order for administration may be treated as an equivalent to the receiving order for this purpose. It seems to me that, if we so treated it, we should really be legislating. The contention in effect comes to this: that, because it would be very convenient for the purposes of administering the estate if the legislature had given this power, we are therefore to reject for this purpose some of the most important words of the section. I do not think that this contention can be supported. That being so, we have an enactment which in certain special cases only has made a departure from ordinary principles with regard to the occasions on which parties may be compelled to give evidence, and which must, therefore, on the well-established rule of construction, be taken to have intended to exclude all other cases: and this being established as the true construction of the Act, light may be thereby thrown on the construction of rule 58, which must be construed as meant to carry out the Act. If that rule went beyond the Act in this respect, and introduced a new method of dealing with the rights and properties of strangers to a proceeding by subjecting them to the exercise of novel and extraordinary powers which the Act had not provided for, I should think that the rule had extended the jurisdiction of the Court in a manner contrary to s. 127, sub-s. 4, and was ultrà vires. But I do not think that the rule has done so. The language used in the rule had been used before with regard to the High Court, and it was well understood that it was only meant to be ancillary to the power of the Court to procure testimony in actions subject to the general principles regulating the giving of testimony. It is clear from the application on which the order was procured, and indeed it is admitted, that the object of this proceeding is to apply the provisions of s. 27 to this case. It therefore appears to me that the order of the county court judge was invalid, and the appeal must be allowed.

Appeal allowed.

Solicitors for appellants: *Jaques, Layton, & Jaques,* for *Scholefield & Son.*

Solicitors for official receiver: *Solicitors to Board of Trade.*

E. L.

[IN THE COURT OF APPEAL.]

1885
April 28.

EX PARTE REYNOLDS. IN RE BARNETT.

Bankruptcy—Power of County Court to restrain Proceedings in High Court—Solicitor—Right of Audience—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 100, 102, 151, 168.

Under the Bankruptcy Act, 1883, a county court sitting in bankruptcy has no power to restrain proceedings in an action in the High Court.

Decision of Cave and Wills, JJ., reversed.

There is no absolute rule that a question relating to the estate of a bankrupt ought to be determined by the Court of Bankruptcy, and not by the High Court, whenever the trustee in the bankruptcy is, by virtue of the bankruptcy law, claiming by a higher title than that of the bankrupt himself. It is a matter of judicial discretion in each case how the question shall best be tried.

In such a matter the Court of Appeal ought not readily to overrule the discretion of the bankruptcy judge.

Per Cave and Wills, JJ. A solicitor has a right of audience on an appeal to the Divisional Court from a county court sitting in Bankruptcy.

APPEAL from an order made by a Divisional Court of the Queen's Bench Division, on an appeal from a county court sitting in bankruptcy, restraining the plaintiffs in an action in the Queen's Bench Division against the trustee in a bankruptcy from further proceeding with the action.

The trustee in the bankruptcy of John Barnett applied to the Croydon County Court for an order that all further proceedings in an action brought by Reynolds & Co. against the trustee personally, in the Queen's Bench Division of the High Court, should be stayed until further order; and that all questions between the parties as to the rights of the trustee and Reynolds & Co. respectively to the goods the subject-matter of the action, or otherwise, should be determined by the county court on an application to be forthwith made by the trustee; and for such further or other order as to the Court should seem meet.

On the 30th of October, 1884, Barnett, who was a builder, was adjudicated a bankrupt in the county court. On the 4th of November the trustee was appointed, who found on the premises of the bankrupt, and took possession of, certain machinery used by him in his business, and which was held by him of Reynolds

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& Co. under a hiring and purchase agreement of the 11th of April, 1883, whereby, on payment of a certain sum by instalments, the machinery was to become the property of the bankrupt. Some only of the instalments had been paid before the bankruptcy.

On the 2nd of December, 1884, Reynolds & Co. brought an action in the High Court against the trustee personally, claiming delivery up and return of the machinery or 473*l.* 5*s.*, its value, and 200*l.* damages for its detention.

An application to the judge of the Croydon County Court to stay the action and to determine the question raised therein, was dismissed with costs, and the trustee appealed to the Divisional Court.

An affidavit of Reynolds & Co. alleged, inter alia, that there was a notorious and universal custom in their trade to supply steam-engines and machinery upon such a hiring and purchase agreement, and that for many years the firm had been constantly in the habit of supplying such machinery under such agreements, and during the past ten years had supplied several hundreds of persons with machinery to the value of between 30,000*l.* and 40,000*l.*

The facts are more fully stated in the judgment of the Divisional Court.

March 24. *Mr. J. E. Fox*, solicitor, for the trustee, in support of the motion. The county court has, for the purposes of its bankruptcy jurisdiction all the powers and jurisdiction of the High Court: 46 & 47 Vict. c. 52 (Bankruptcy Act, 1883), s. 100; and may at any time after the presentation of a bankruptcy petition stay any action: s. 10. Therefore the county court might have made the order to stay. Where the trustee has a higher and better title than the bankrupt, the Court of Bankruptcy ought to decide the matter itself: *Ex parte Brown, In re Yates.* (1) Here the trustee has such higher right.

Poyser, for Reynolds & Co. It is a question whether a solicitor has a right of audience in this court when sitting on appeal from the county court in bankruptcy, although having had right of audience before the Chief Judge in Bankruptcy, he is to have "the

(1) 11 Ch. D. 148.

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like right of audience in bankruptcy matters in the High Court:" 46 & 47 Vict. c. 52, s. 151. This Court is a Court of Appeal, and is so treated in the Bankruptcy Rules, 1883. Solicitors had not audience in the Court of Appeal in Bankruptcy.

[CAVE, J. But this is the High Court, and the Bankruptcy Act, 1883, s. 151, enacts that "Nothing in this Act, or in any transfer of jurisdiction effected thereby shall take away or affect any right of audience that any person may have had at the commencement of this Act, and all solicitors and other persons who had the right of audience before the Chief Judge in Bankruptcy shall have the like right of audience in bankruptcy matters in the High Court." The present case is a bankruptcy matter in the High Court, and is such as the Chief Judge in Bankruptcy used to hear under the former Act. Before the Chief Judge under the former Act a solicitor had a right of audience, and therefore we are of opinion that he can be heard in the matter in this Court.]

Poyser. Then as to the jurisdiction of the county court. The jurisdiction is, at most, discretionary. Although, as a general rule, cases in which the trustee in bankruptcy is asserting a claim to property by a higher title than that of the bankrupt himself ought to be tried in the Court of Bankruptcy, yet the rule is not an inflexible one, but the Court has a judicial discretion, to be exercised with regard to all the circumstances of the case: *Ex parte Armitage, In re Learoyd, Wilton & Co.* (1)

The point in dispute is, whether there is a custom as to these agreements for hire of machinery. The claimants have upwards of 30,000*l.* worth of machinery let out on hire under similar agreements, and the question is of importance to them. Few cases are more difficult to try than those involving custom; nice points of law as to the admissibility of evidence arise, and there is often a great conflict of testimony. The trustee has delayed his application. The action will be sooner tried if allowed to proceed in the High Court, and the county court judge exercised his discretion rightly in leaving this matter to be tried there: *Ex parte Price, In re Roberts.* (2) If it is tried in the High Court, it will be tried by a judge of high rank; there will

(1) 17 Ch. D. 13. (2) 21 Ch. D. 553.

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be a jury of twelve men instead of five, and the claimants will be able to have the assistance of a higher class of counsel: see per Jessel, M.R. (1) There is a provision in the Bankruptcy Act, 1883, that the jurisdiction of the county court shall not be exercised for the purpose of adjudicating upon any claim not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto, or the money, money's worth, or right in dispute does not in the opinion of the judge exceed in value 200*l.*: s. 102. That indicates the amount which the county court should deal with. The claim here is by the owners of the machinery and does not arise "out of the bankruptcy;" but because the trustee sets up a defence under the Bankruptcy Act, he seeks to draw them within the jurisdiction of the county court. The county court judge assumed that he had jurisdiction, yet, having regard to all the circumstances of the case and to the authorities which were before him, he thought the proceedings should be in the High Court.

But it is doubtful whether the Court has any power to make this order. Formerly, the whole jurisdiction under the Bankruptcy Act, 1869, to restrain actions was given by s. 72, and in *Ex parte Ditton, In re Woods* (2), it was contended that the Judicature Acts took away from the Bankruptcy Court the power of restraining actions, but the Court of Appeal held that the jurisdiction of the Court of Bankruptcy to restrain proceedings in other courts still existed. But s. 72 is repealed, and the equivalent section of the Act of 1883, is s. 102, and the new s. 93 makes the London Bankruptcy Court a part of the Supreme Court.

[Cave, J. The county court, however, is not part of the High Court, but only exercises some of its powers.]

Since the Judicature Act, 1873, a county court has no jurisdiction to restrain proceedings in the High Court: see *Cobbold* v. *Pryke*. (3) "The Judicature Act, 1873, by s. 24, sub-s. 5, in terms directs that no cause pending in the High Court of Justice shall be restrained by prohibition or injunction:" per Lord Coleridge, C.J. (4)

(1) 21 Ch. D. 556.
(2) 1 Ch. D. 557.
(3) 4 Ex. D. 315.
(4) 4 Ex. D. 316.

If the county court had no jurisdiction to make the order this Court will not direct it to make it.

[He was stopped on the question of the jurisdiction.]

Mr. Fox. There was jurisdiction in the county court as a court in bankruptcy: *Ex parte Ditton, In re Woods.* (1) Sect. 93 of the Bankruptcy Act, 1883, makes the London Bankruptcy Court only, and not the county court in bankruptcy, part of the Supreme Court.

The Court of Bankruptcy has power to restrain a creditor from bringing against the trustee under a liquidation an action upon a bill of sale given by the debtor, the validity of which is disputed by the trustee: *Ex parte Cohen, In re Sparke.* (2) And even to restrain a person not a party to the bankruptcy from dealing with property alleged to have been fraudulently assigned before the bankruptcy: *Ex parte Anderson, In re Anderson.* (3)

The case of *Cobbold* v. *Pryke* (4) does not apply. It was an administration suit and no question of bankruptcy.

Poyser. The cases relied upon by the trustee were under the Bankruptcy Act, 1869. In *Ex parte Ditton, In re Woods* (1), it was contended that the Judicature Acts applied to bankruptcy proceedings, but James, L.J., thought not, and that, therefore, the old jurisdiction of the Court of Bankruptcy existed. But s. 93 alters that by enacting, 1, that the jurisdiction of the London Bankruptcy Court shall be transferred to the High Court, and, 2, that for the purposes of the union, consolidation, and transfer, and of all matters incidental thereto and consequential thereon, the Supreme Court of Judicature Act, 1873, as amended by subsequent Acts, shall have effect.

[WILLS, J. But where is the county court made a branch of the High Court?]

Not in the Act but by the effect of *Cobbold* v. *Pryke.* (4)

[WILLS, J. There was a statutory provision there, but there is none here.]

The intention of the legislature was to make one High Court, and the power of one Court to restrain another being abolished, it was thought right to deal with the Bankruptcy Court in the

(1) 1 Ch. D. 557.
(2) Law Rep. 7 Ch. 20.
(3) Law Rep. 5 Ch. 473.
(4) 4 Ex. D. 315.

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same way and it was brought into the High Court. It could not have been intended that the county court should have a restraining power which the High Court has not. By the 9th section of the Judicature Act, 1875, that part of s. 3 of the Judicature Act, 1873, relating to the London Court of Bankruptcy was repealed, and in *Ex parte Ditton, In re Woods* (1), Mellish, L.J., said (2), "If the alteration made by the 9th section of the Judicature Act, 1875, had not been made, the county courts acting in bankruptcy would have retained their power of granting injunctions, while the London Court of Bankruptcy would not." That is, that but for s. 9 the jurisdiction of the London Court would have been taken away. There is nothing in the Bankruptcy Act of 1883 to confer on the county court jurisdiction to stay actions in the High Court. The county court is given, by s. 100, the same powers as the High Court, which do not include a power to stay actions. The county court has only the jurisdiction of the London Court of Bankruptcy, delegated by s. 100. It would be anomalous that the London Court of Bankruptcy should be unable to restrain another division of the High Court, and yet that the county court in bankruptcy might do so. Sect. 10 has clearly nothing to do with the present question.

Cur. adv. vult.

April 1. The judgment of the Court (Cave and Wills, JJ.) was delivered by

CAVE, J. This is an appeal from an order of the county court judge at Croydon refusing to stay further proceedings in an action brought by Messrs. F. W. Reynolds & Co. against the trustee, and also refusing to determine a question which had arisen between Reynolds & Co. and the trustee in the bankruptcy and which formed the subject matter of the action.

Barnett, who was formerly a builder at Shortlands, was adjudicated bankrupt on the 30th of October, 1884, and the appellant was appointed trustee on the 4th of November. At the time of his bankruptcy Barnett had in his possession some machinery which he used in his business and which he had got from Reynolds

(1) 1 Ch. D. 557. (2) 1 Ch. D. at p. 559.

& Co. under an agreement of the 11th of April, 1883, on what is known as the purchase hire system. Under this agreement Barnett was to have paid the purchase-money of the machinery, 473*l.* 5*s.*, by instalments, and at the time of his bankruptcy he had paid only about 270*l.*

As soon as the trustee had been appointed Reynolds & Co. laid claim to the machinery in question, and negotiations ensued, and ultimately, on the 29th of November, Reynolds & Co.'s solicitors wrote to the trustee that they had heard nothing from his solicitor and were instructed to take legal proceedings if the matter was not satisfactorily arranged before one o'clock on the following Monday, December 1st. On that day the trustee's solicitor called on Reynolds & Co's solicitor and informed him that the trustee would at once apply to the Court of Bankruptcy to decide as to the ownership of the machinery in question, which the trustee claimed as having been in the possession, order, and disposition of the bankrupt at the time of the bankruptcy.

On the 2nd of December Reynolds & Co.'s solicitor issued a writ against the trustee claiming a return of the machinery or 473*l.* 5*s.* its value, and 200*l.* for detention, and a statement of claim to the same effect was subsequently delivered, in which Middlesex was named as the place of trial. On the 6th of January, 1885, the trustee obtained leave to deliver, and delivered, short notice of motion for an order which, as has been stated, the Court refused to make, and against which refusal this appeal is now brought.

In order to understand the point in dispute it is necessary to consider the old law. Sect. 72 of the Act of 1869 was as follows: "Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, arising in any case of bankruptcy coming within the cognizance of such Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case." Questions soon arose as to the extent of the jurisdiction given by this section, and ultimately the general principle was laid down that where a trustee claimed only the

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same right as the bankrupt himself would have had, the Court of Bankruptcy ought not to assume jurisdiction, but ought to leave the matter to be dealt with by the ordinary tribunals: *Ellis* v. *Silber* (1); but that where by the operation of the law of bankruptcy the trustee had a higher and better title than the bankrupt, the Court of Bankruptcy ought to decide the matter itself: *Ex parte Brown, In re Yates.* (2) This rule, however, was not an inflexible one, and did not preclude the Court from exercising a discretion not to assume the trial of the case. Thus, where considerable property was at stake and questions seriously affecting character were involved, it was held the case ought to be tried in the High Court and not in a county court: *Ex parte Armitage, In re Learoyd & Co.* (3); *Ex parte Price, In re Roberts.* (4)

This was the state of the law when the Act of 1869 was repealed, and that of 1883 came into operation. The first clause of s. 102 of the later Act is the same as that part of s. 72 of the earlier Act which I have already read, but s. 102 contains this very material proviso: "Provided that the jurisdiction hereby given shall not be exercised by the county court for the purpose of adjudicating upon any claim, not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto, or the money, money's worth, or right in dispute does not in the opinion of the judge exceed in value two hundred pounds." Now, it seems to us that this proviso is intended to enforce the jurisdiction of the Court of Bankruptcy and even to extend it to cases by consent or under 200*l.* where it had been excluded by previous decisions. The proviso does not extend to claims "arising out of the bankruptcy," that is, as we understand it, to cases where, by the operation of the law of bankruptcy, the trustee has a higher and better title than the bankrupt; and these cases consequently are governed by the general rule laid down in *Ex parte Brown.* (5) It does extend to other cases arising in the bankruptcy including cases where the trustee claims only the same right as the bankrupt would have had, and as to these cases it lays down the new prin-

(1) Law Rep. 8 Ch. 86.
(2) 11 Ch. D. 148.
(3) 17 Ch. D. 13.
(4) 21 Ch. D. 553.
(5) 11 Ch. D. 148.

ciple that the Court is to exercise jurisdiction where the parties consent, or where the amount in dispute does not exceed 200*l.*

The present case is one of those in which the trustee by the operation of the law of bankruptcy had a higher and better title than the bankrupt, and we agree therefore with his Honour that the Court had jurisdiction although the parties did not consent and the value of the subject matter exceeds 200*l.*, and the only question is whether the case falls within the exception to the general rule recognised in *Ex parte Armitage* (1) and *Ex parte Price.* (2) No questions of character are involved, and the amount in dispute is in itself comparatively unimportant, but it is alleged as grounds for the refusal of the Court to exercise its jurisdiction that the trustee was guilty of delay in taking proceedings, that the claim might be more expeditiously disposed of by allowing the action to proceed, that the question is one of importance to Reynolds & Co., who have machinery of the value of 30,000*l.* or 40,000*l.* on hire, and that they wanted to have the case tried by a jury. There seems no ground for the imputation of delay. The trustee was only appointed on the 4th of November, negotiations were proceeding down to the 24th of November, and on the 1st of December he gave informal notice of his intention to apply to the Court. Reynolds & Co. somewhat hastily issued a writ on the 2nd, and the trustee applied to the Court on the 6th of January. As to relative expedition of proceedings, his Honour might have fixed a day for the hearing in February, and have disposed of the case in that month, while at present there seems no probability that the action in the High Court will be heard before Whitsuntide. As to the third ground, the decision in this case will not necessarily govern others; nor, if it would, does it seem alone a sufficient reason for declining a jurisdiction which is clearly given by the statute. The last ground which seems to have weighed most with his Honour, and but for which probably he would have exercised his jurisdiction, seems to have been put forward solely for the purpose of influencing the mind of the judge. Now that it has done its work it has been dropped, and the case has been set down by the plaintiffs for trial without a jury.

(1) 17 Ch. D. 13. (2) 21 Ch D. 553.

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After a careful consideration of these grounds we are of opinion that this case falls within the general rule and not within the exception, and that the case must be remitted to the county court judge for hearing. We would suggest that it would be convenient, looking at the nature of the question to be tried, that the judge should direct the trustee to give notice of motion for a particular day to be fixed by the judge, and that the case should be heard on vivâ voce evidence without affidavits.

This disposes of the substantial question in the case, but a subsidiary though important question arises, viz., whether the trustee is entitled to an order restraining Reynolds & Co. from continuing proceedings in the action. Mr. Poyser contended that the county court as a court of bankruptcy has no jurisdiction at present to restrain an action in the High Court. That jurisdiction it is argued was conferred under the Act of 1869, by s. 66 of that Act, which gave the county court all the powers and jurisdiction of the Court of Chancery, while s. 100 of the present Act gives the county court all the powers and jurisdiction of the High Court, which powers do not include the power to restrain an action in the High Court, seeing that by the Judicature Act, 1873, s. 24, sub-s. 5, no cause or proceedings in the High Court is to be restrained by prohibition or injunction. We think, however, that the power of the Court of Bankruptcy to restrain actions was not conferred by s. 66 of the Act of 1869. The Court of Bankruptcy appears always to have exercised a jurisdiction analogous to that of Courts of Equity by way of injunction. Thus in *Ex parte Figes* (1) the Court on an ex parte application on behalf of the bankrupt restrained the assignees from selling the property until further order. So in *Ex parte Harding* (2) the Court granted an injunction to restrain the negotiation of a promissory note. Again, in *Ex parte Leigh* (3) the Court restrained the bankrupt from proceeding in an action at law which he had commenced to contest the validity of the commission. The powers of the Court over parties other than the bankrupt and his creditors were much extended by s. 72 of the Act of 1869, and in 1871 it was decided by by the Court of Appeal in *Ex*

(1) 1 Gl. & J. 122. (2) Buck, 24.

(3) 2 Gl. & J. 332.

parte Cohen (1) that in cases to which that section was intended to apply the Court of Bankruptcy had power to restrain actions.

That decision was followed by many others in which injunctions were granted, such as *Morley* v. *White* (2); *Ex parte Gordon* (3); and *In re Thorpe* (4), and in none of them is the jurisdiction to restrain an action treated as depending on s. 66 of the Act, but rather as an exercise of the ordinary powers of the Court brought into play by s. 72. In *In Ex parte Ditton* (5) it was contended that by virtue of s. 24, sub-s. 5 of the Judicature Act of 1873, the Court of Bankruptcy had lost its power to restrain actions in the High Court by injunction, but it was held that there was no doubt whatever that the jurisdiction of the Court of Bankruptcy to restrain proceedings in other courts still existed, that there was nothing in the Judicature Acts which interfered with the jurisdiction of the Court of Bankruptcy as it existed before those Acts, and that s. 24 of the Act of 1873 only provided rules for the manner in which the High Court of Justice should carry on its own proceedings. Sect. 100 of the Act of 1883 provides that a county court shall, for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the Court, have all the powers and jurisdiction of the High Court; and the ordinary powers of the Court which are hereby preserved appear to us to include the power of restraining actions which the Court of Bankruptcy seems always to have exercised, and which in some form or other is absolutely necessary to its existence as an effective Court.

It was urged that the observations of Mellish, L.J., in *Ex parte Ditton* (5), as to the effect of s. 3 of the Judicature Act of 1873 are equally cogent as to the effect of s. 93 of the Bankruptcy Act of 1883. The Lord Justice there expressed an opinion that, if the alteration made by the 9th section of the Judicature Act of 1875 had not been made, and if consequently the London Court of Bankruptcy had been united and consolidated with the High Court, the county courts acting in bankruptcy would have retained their power of granting injunctions while the London Court of

(1) Law Rep. 7 Ch. 20.
(2) Law Rep. 8 Ch. 214.
(3) Law Rep. 8 Ch. 555.
(4) Law Rep. 8 Ch. 743.
(5) 1 Ch. D. 557.

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Bankruptcy would not. If, it was argued, the London Court has, by the effect of s. 93 of the Act of 1883, lost its power of granting injunctions, it is anomalous that the county courts should retain that power. But, if the London Court has lost the power of granting injunctions, on which it is not necessary to give an opinion to-day, it has by the union with the High Court acquired a power almost equally valuable. As a member of the Queen's Bench Division of the High Court, the judge in bankruptcy has jurisdiction to stay any proceedings in that division, and he would not, we apprehend, hesitate upon a proper case being made to direct the trustee to apply for a stay of proceedings in the Chancery Division should such a step ever become necessary. The case of *Cobbold* v. *Pryke* (1) does not deal with the powers of the county court as a court of bankruptcy, and is distinguishable on that ground. We therefore come to the conclusion that the trustee is entitled to an injunction restraining Reynolds & Co. from proceeding with their action until further order, but he must give an unqualified undertaking to be answerable for damages and to proceed with the motion in the Court below with due diligence.

The trustee must have his costs of this appeal, and the costs in the Court below must abide the result of the motion to be heard unless the judge shall see reason to direct otherwise.

Order accordingly.

J. R.

From this decision Reynolds & Co. appealed. The appeal was heard on April 24, 27, 28, 1885.

Pollard, and *Poyser*, for the appellants. It has never yet been decided that there is a custom among builders of hiring the machinery which they use in their business so notorious in the trade as to exclude the reputation of ownership by a builder of machinery in his possession. The question is one of great importance, and it is desirable that it should be tried by a judge of the High Court, in which case there will be a right of appeal to this Court and to the House of Lords. Sect. 102 (2) of the

(1) 4 Ex. D. 315

(2) Sect. 100: "A county court shall, for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the Court, have all the powers and jurisdiction of the High

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Bankruptcy Act, 1883, enables the county court to try the question, but it gives no power to restrain the proceedings in an action in the High Court. Nor does s. 100, as the Divisional Court thought, give that power. Its language differs from that of s. 66 of the Bankruptcy Act, 1869, which gave county courts sitting in bankruptcy the power of restraining proceedings in actions and suits. Under s. 66 county courts had in bankruptcy "all the powers and jurisdiction of a judge of the Court of Chancery." Under s. 100 the county courts have the powers and jurisdiction of the High Court, and no division of the High Court can restrain the proceedings in an action in another division. The only mode under the Judicature Act of staying the proceedings in an action is by an application in the action for a stay of proceedings. The London Court of Bankruptcy is now a branch of the High Court: Bankruptcy Act, 1883, s. 93; and, if the view of the Divisional Court is right, county courts sitting in bankruptcy have a power which the London Court has not. This would have been the case under the Bankruptcy Act, 1869, after the passing of the Judicature Act, 1873, but that the Judicature Act of 1875 enacted that the London Court should not, as was originally provided, be a part of the High Court. This was pointed out by Mellish, L.J., in *Ex parte Ditton*. (1) The Divisional Court thought that Courts of Bankruptcy had before the Bankruptcy Act of 1869 exercised a power of restraining the proceedings in actions, but the power given to county courts in bankruptcy was

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Court, and the orders of the Court may be enforced accordingly, in manner prescribed."

Sect. 102 (1): "Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

"Provided that the jurisdiction hereby given shall not be exercised by the county court for the purpose of adjudicating upon any claim not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto, or the money, money's worth, or right in dispute does not in the opinion of the Judge exceed in value two hundred pounds."

(1) 1 Ch. D. 557.

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a purely statutory one. The jurisdiction in bankruptcy was originally part of the jurisdiction of the Lord Chancellor, and that explains the fact that bankruptcy judges formerly restrained the proceedings in common law actions.

[BAGGALLAY, L.J., referred to *Ex parte Cohen.* (1)]

That the jurisdiction of county courts under the Bankruptcy Act, 1869, to restrain proceedings in an action depended on s. 66 is shewn by *Ex parte Anderson.* (2)

The ordinary power of a county court is shewn by *The Queen* v. *Judge of the County Court of Surrey* (3); *Cobbold* v. *Pryke.* (4) At any rate the Divisional Court ought not to have interfered with the exercise of the discretion of the county court judge. The Divisional Court was exercising an appellate jurisdiction, and it could not itself order a stay of the proceedings in the action. If the Divisional Court had not been sitting in bankruptcy there would have been an absolute right of appeal from its order.

The property in question not being property of the bankrupt, s. 10 of the Act does not apply.

Under s. 102 of the Bankruptcy Act, 1883, the Bankruptcy Court has a discretion whether it will try a question arising in bankruptcy itself or leave it to be tried by the ordinary tribunal, and in such a case as the present it would be much better that the trial should take place in the High Court: *Ellis* v. *Silber* (5); *Ex parte Armitage* (6); *Ex parte Price.* (7)

Bigham, Q.C., and *Swinfen Eady*, for the trustee. The power of the county courts exercising their bankruptcy jurisdiction under the Bankruptcy Act, 1869, to restrain proceedings in an action arose under s. 72 of that Act, and not under s. 66, and s. 102 of the Act of 1883 is the same in substance as s. 72 of the Act of 1869: *Ex parte Anderson* (2); *Snow* v. *Sherwell* (8); *Halliday* v. *Harris* (9); *Ex parte Cohen.* (1) That power therefore remains under the Act of 1883. And s. 100 gives the judge of a county court in bankruptcy all the powers and jurisdiction

(1) Law Rep. 7 Ch. 20.
(2) Law Rep. 5 Ch. 473, 478.
(3) 13 Q. B. D. 963.
(4) 4 Ex. D. 315.
(5) Law Rep. 8 Ch. 83.
(6) 17 Ch. D. 13.
(7) 21 Ch. D. 553.
(8) 25 W. R. 433.
(9) Law Rep. 9 C. P. 668, 677.

of the High Court, not merely of one division of the High Court. It is much more convenient that an application for a stay of proceedings in an action should be made to the county court in which the bankruptcy proceedings are than to the High Court in London. At any rate, the application to the Divisional Court, though in form by way of appeal, was in substance an application to the High Court for a stay of the proceedings in the action. When s. 100 speaks of "the ordinary powers of the Court" it means the Court of Bankruptcy. Sect. 168 defines "the Court" as meaning "the Court having jurisdiction in bankruptcy under this Act." Courts of Bankruptcy have always been in the habit of restraining the proceedings in actions.

The present case is one in which the trustee claims by a higher title than that of the bankrupt himself, and therefore the question ought to be tried in the Court of Bankruptcy: *Ex parte Brown* (1), and the Divisional Court have expressed an opinion to that effect. It is said that it is desirable that the question should be tried by a judge and jury, but the plaintiffs have set the action down for trial by a judge without a jury.

Pollard, in reply.

BRETT, M.R. This bankruptcy is proceeding in a county court, and the bankrupt, who is a builder, had hired certain machinery for the purposes of his business. The persons who claim to be the owners in fact of that machinery brought an action in the Queen's Bench Division against the trustee in the bankruptcy to recover it back. The defence set up (both in the action and in the Bankruptcy Court) is, admitting that the machinery was not in fact the bankrupt's property, that it was at the commencement of the bankruptcy in his possession or disposition as reputed owner. The county court judge, having to administer the bankruptcy law, finding that there was this action pending, came to the conclusion that the question of reputed ownership would depend upon this—whether it is so well known amongst the people who deal with builders that they are in the constant habit of hiring the machinery with which their business is carried on, that no one who deals with a builder ought to give him credit relying

(1) 11 Ch. D. 148.

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upon the fact that he has machinery in his possession, or ought to assume as a matter of course that it is his machinery. That is a most important question to several large classes of persons, viz., to all builders, to all those persons who are in the habit of dealing with builders, and to that which is alleged to be a large class of persons who are in the habit of letting out their machinery to builders. It is not a question of law, but it depends entirely upon a considerable knowledge of business. Now, when such a question first arises with reference to any particular trade it is a question of fact whether the alleged habit (for it is wrong to call it a custom in the legal sense) does or does not exist in the particular business, and whether it is generally known amongst the persons who deal with the particular class of traders, and the question must be tried at first upon the evidence in the particular case. It must certainly be tried in this way more than once, but if the thing is proved several times in the courts, and is adopted by the superior Courts, the Court after that will take judicial notice of it, and will not require it to be proved again in any subsequent case. Therefore the first trial of such a question with regard to a particular trade or business is of the utmost importance to large classes of people. Now, how were cases of this kind formerly tried at common law, from the time of Lord Mansfield downwards? They were tried by a judge and jury, and, in my opinion, what the Courts chiefly rested upon after these cases had been tried three or four times was this, that that they had then got separate findings of twelve men of business in each case, separate findings that men of business and people dealing with certain classes of traders did know of the habit, that the so-called custom was well known to the trade. It was not the casual finding of one jury upon the evidence before them, but you had the findings of three or four juries when the question had been thoroughly mooted, and when it was perfectly certain that the best evidence would be given if not on the first, certainly upon the second or third occasion. For this reason the Courts acquiesced in and adopted the findings of the juries, and would not send the question again for trial. The question now raised is, so far as I know, raised for the first time, and that being so, it is, in my opinion, precisely the case which, for the benefit

of the suitors, for the benefit of the two trades, and for the advantage of the Courts, should be tried by a superior tribunal, and not only by a judge, but by a judge and jury, so as to get the question settled in such a way that the Courts will in the future adopt the conclusion. I do not say that, if such questions are tried under the present system by a judge alone, the Courts will not after a certain time adopt the successive opinions of different judges, but it cannot be pretended that a judge has the same knowledge of the mere practice of business, as distinguished from law, as a jury of business men. A judge can only act on the evidence before him in the particular case. No doubt there is an advantage in having such a case tried by a judge of the High Court, even without a jury, because there is right of appeal, and you would have then not only the opinion of the single judge who tried the case, but the opinion of the Court of Appeal, judging of the evidence before them; and the case might even go to the House of Lords. But still, as a matter of business, upon such a question, a trial before a judge alone has not the same weight with the trade or with the Courts in future as a trial before a judge and a jury.

Now, this action being pending, the county court judge, when an application was made to him by the trustee that he would proceed to try the question himself in the bankruptcy, thought it better not to do so, but that the question should be tried before a superior tribunal, and that he should wait until it had been tried before a judge and jury, when he should act upon the verdict and judgment so obtained Any course more wise and prudent I cannot conceive. Then the case was taken to the Divisional Court, who were of a different opinion, not, as I gather, upon the line of reasoning which I have stated, but upon the more general view that, since the Judicature Act, it is desirable that, when a Court is once seized of a case, every question which arises in that case should be decided in that court. That is a very good general rule, and it is applicable in many cases; but, with the greatest deference to the Divisional Court, as a matter of principle I do not think the rule applies to the present case. I think the Divisional Court overlooked the reasoning applicable to this particular class of cases. The county court judge having thus exercised his

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discretion, the Divisional Court came to this most important conclusion, that he had the power, if he had chosen to exercise it, to issue an injunction to the plaintiffs not to proceed with their action in the High Court. They came to the conclusion that he had that power under the Bankruptcy Act, 1883, and that he ought in this particular case to have exercised it; and thereupon, doing as a Court of Appeal that which they thought he ought to have done in the first instance, they issued an injunction restraining the plaintiffs from further proceeding with their action in the High Court. Thereupon the present appeal is brought, and two questions are raised. First, it is argued that the judge of a county court sitting in bankruptcy has now no power to issue such an injunction, and, if he has no power to do it, it is said that upon this appeal no other question can arise; the question whether he properly exercised his discretion cannot arise if he had no power to issue an injunction at all. But, further, it is said, supposing the county court judge had the power to issue the injunction, he has exercised his discretion in the matter, and the Divisional Court on appeal ought not to have set aside his discretion. On the other side, it is said that the judge had the power to issue the injunction, and that, if he had exercised his discretion rightly, he would have issued it. And, further, it is said that, even if he had not the power, so that he had no discretion to exercise, yet the case ought to be treated now as if a motion had been made in the High Court to stay the proceedings in the action absolutely, leaving the question to be tried in the county court, or, at all events, to stay the proceedings until the question had been tried in the county court.

The first question, then, is whether it is true to say that a county court, exercising its bankruptcy jurisdiction, has now the power to issue an injunction to a plaintiff in an action in the High Court not to proceed with his action. The power of the county courts in bankruptcy must now be determined solely by the Bankruptcy Act of 1883. That Act does not incorporate the former Bankruptcy Acts or leave them standing. By the Act of 1883 the whole previous legislation was swept away; the whole thing was made a tabula rasa, and now the whole of the bankruptcy jurisdiction is contained in the Act of 1883. What, then,

is the power of a county court with regard to this question of injunction? The question is not what matters are within its jurisdiction in bankruptcy, but what power it has in respect of matters which are subject to its jurisdiction in bankruptcy. The jurisdiction as to the subject-matter is conferred by s. 102, and that this question whether certain goods were in the reputed ownership of a bankrupt is a subject-matter within the jurisdiction of a county court is perfectly clear. But what is the power of a county court with regard to issuing an injunction to restrain the proceedings in an action pending in the High Court? The power of a county court with regard to bankruptcy matters is contained in s. 100, which says: "A county court shall, for the purposes of its bankruptcy jurisdiction," that is, in respect of matters which are within its bankruptcy jurisdiction, "in addition to the ordinary powers of the Court, have all the powers and jurisdiction of the High Court." It was suggested that the words "the Court" mean the Bankruptcy Court. What Bankruptcy Court? Do they mean the old Bankruptcy Court or do they mean the London Court of Bankruptcy? The only way in which anything can be made of the argument is by suggesting that the old Court of Bankruptcy is meant. But that, as it seems to me, would be contrary to the ordinary grammatical meaning of the words. Taking them according to their ordinary grammatical construction, I cannot doubt that they do not refer to the old London Bankruptcy Court, or to any Bankruptcy Court, but that they are to be referred to the words at the beginning of the section, "a county court." "A county court shall, in addition to the ordinary powers of the Court," that is, of the county court (and we know very well what are the ordinary powers of a county court—it is a court of record), "have all the powers and jurisdiction of the High Court." That, no doubt, gives the county court all the powers and jurisdiction both of the Chancery Division and of the Queen's Bench Division of the High Court. But it was curiously argued by Mr. Bigham that, though the words are "the powers and jurisdiction of the High Court," they give to county courts powers which the Chancery Division has not and which the Queen's Bench Division has not; that you must mix up the two jurisdictions together and give the county courts a

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jurisdiction which neither Division of the High Court has. That is the very acme and essence of ingenious fallacy, and it shews the length to which advocacy will sometimes go. Of course it means that the county court is to have all the powers and jurisdiction of the Chancery Division if the matter was being dealt with there, and all the powers and jurisdiction of the Queen's Bench Division if the matter was being dealt with there. This will not help it in the matter of an injunction, for no branch of the High Court can now restrain by injunction the proceedings in another branch.

But it is said that there are cases which shew that this jurisdiction by way of injunction, if not given by the 100th section, is a necessary implication from the 102nd section.

It is said that the 102nd section is in the same terms as the 72nd section of the Act of 1869, and that under the Act of 1869 the power of a county court to grant such an injunction was held to arise by necessary implication from the 72nd section of that Act. For this proposition the principal case cited was *Snow* v. *Sherwell.* (1) To my mind the only colour for saying that it was so held in that case is the head-note; neither of the judges said so. Jessel, M.R., said (p. 434): "That was the trustee's case, and therefore it was a case in which the Court of Bankruptcy had jurisdiction under s. 72." He was not then referring to this jurisdiction to grant an injunction. The question there raised was, whether the subject matter was within the jurisdiction, and that of course depended upon the 72nd section. There could be no question under the Act of 1869 that, with regard to the subject matter of its bankruptcy jurisdiction under s. 72, a county court had by reason of s. 66 of that Act power to issue an injunction to restrain the proceedings in an action in the High Court. But s. 66 in that Act was not expressed in the same terms as s. 100 of the present Act. Section 66 gave to the county court in bankruptcy all the powers and jurisdiction (not of the High Court, because it did not then exist) but of the High Court of Chancery. That the High Court of Chancery had power to issue an injunction to restrain the proceedings in an action could not be denied, and the only question before the Court in *Snow* v.

(1) 25 W. R. 433.

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Sherwell (1) was, whether the case came within s. 72; if it did, it followed that the power to grant the injunction was given by s. 66. That is not a decision that the power of granting an injunction was a necessary implication from s. 72. The same observation applies to *Halliday* v. *Harris*. (2) The difference between the Act of 1869 and the Act of 1883 is this, that by the former the powers and jurisdiction of the High Court of Chancery were expressly given to county courts, whereas by the latter there is only given "the powers and jurisdiction of the High Court." Neither the Chancery Division nor the Queen's Bench Division of the High Court can now issue an injunction to restrain the proceedings in any action, the Court does not enjoin itself. If necessary, the Court in which the action is brought can stay the proceedings in it. It was not seriously denied by Mr. Bigham that the judge of the London Bankruptcy Court, who is now a judge of the High Court, has not this power, and it would be a strange anomaly if the legislature had given this power to the county courts and not to the London Court. It is said that such a power is necessary. To my mind it is obviously not necessary. If there is an action pending in the High Court, an application can be made in that court to stay the proceedings, and the Court would have to consider whether it was proper to do so, because the question raised in the action was one which could be and ought to be tried in the county court in bankruptcy. If it was, the High Court would no doubt stay the proceedings in the action. But, if they thought that the case was one which ought to be tried in the superior court, either by a judge alone or by a judge and jury, and especially if they were told that the judge of the county court had stated that he was willing to abide by the event of such a trial, they would refuse to stay the proceedings in the action. And, if a Divisional Court of the High Court was of opinion that the question was a proper one to be tried in that court, I cannot anticipate that any county court judge would say, I will take no notice of that decision, but I shall proceed to try the case myself, and, if I think fit, I shall decide it contrary to the decision of the High Court. The Court cannot anticipate that any other Court will act in that way. But,

(1) 25 W. R. 433. (2) Law Rep. 9 C. P. 668.

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inconvenient or not, it seems to me that the county court has now no jurisdiction to issue such an injunction.

Then it was said that we ought to treat this matter as if the Divisional Court had in fact ordered a stay of the proceedings in the action. I think we ought not. It is not a mere matter of form. I think that the Divisional Court had no power on the hearing of the appeal in bankruptcy to stay the proceedings in the action which was in their court. If it had been a mere matter of form we might have set it right, but I think it is not. Then it is said that the proceedings in the action ought to be stayed, because a binding rule was laid down in *Ex parte Brown* (1), that, such a case as this, where the trustee's right is a higher one than that of the bankrupt himself, should be tried in the Bankruptcy Court, and that no issue in it ought to be allowed to go on at the same time to trial in the High Court. I do not think that it was intended in *Ex parte Brown* (1) to lay that down as an absolute binding rule in all cases. In *Ex parte Armitage* (2), James, L.J., who decided *Ex parte Brown* (1) expressly stated that he did not mean so to lay it down, and that the question must be decided in each case as a matter of discretion. On every point, therefore, it seems to me that the appellants must succeed.

I am very sorry to differ from the view of the Divisional Court, more especially as the judge to whom the bankruptcy business is now assigned was a member of it. But I cannot help thinking that the Divisional Court acted upon the general rule that under the Judicature Act, when the same matter is proceeding in two courts, it ought to be dealt with by one of them alone, and that this led them to overlook, first, the fact that there is now no power to restrain by injunction the proceedings in another Court; and, secondly, the real merits of the case, and that it is most valuable to trade, as well as to the Courts themselves, that such a case as this should not be tried in a county court. However able the individual judge might be, his decision would be of no authority in other parts of the kingdom; it could not be a decision which the Courts could adopt and act upon for the future, and therefore the same question would have to be tried whenever it

(1) 11 Ch. D. 148. (2) 17 Ch. D. 13.

arose in each separate county court. And, so far as I can see, you might have such a habit or custom of trade set up as different in half-a-dozen different county courts, whereas if it is habit or custom it ought to be the same throughout the kingdom.

I will make one further observation, and that is that the doctrine of reputed ownership is a doctrine which ought in particular trades to be carefully watched and ought not to be extended, and the moment it is found that creditors ought not to rely upon the fact that goods are in the possession of their debtor, the Court ought to be strict in saying that the property of one man shall not go to pay the debts of another.

Baggallay, L.J. (after stating the facts, continued) :—When the county courts first had a jurisdiction in bankruptcy given to them by the Act of 1869, powers were conferred upon them corresponding to those which were conferred upon the London Court of Bankruptcy. Those powers were given by the 65th and 66th sections of the Act, the former section having reference to the powers of the chief judge of the London Court, the latter to the powers of the county court judges, and in both sections the powers were conferred by reference to the powers exercised by the judges of the Court of Chancery. Then the 72nd section gave a general jurisdiction to the Courts of Bankruptcy, whether the London Court or the county courts, to determine all questions which had to be decided in order to a proper distribution of the bankrupt's property amongst his creditors. Very shortly after the passing of that Act, *Ex parte Anderson* (1) came before Giffard, L.J. The argument before us has placed the decision of that case almost entirely upon the operation of the 72nd section, and has not given proper weight to the 66th section. It was a county court case, and there was a good deal of discussion as to whether the case came under the Act of 1861 or the Act of 1869, but, having paved the way by deciding that it was to be determined according to the Act of 1869, Giffard, L.J., dealt with the 65th, 66th and 72nd sections. With regard to s. 66, he said (p. 479) : "This language is perfectly plain ; it says, in so many words, that a judge of the Court of Bankruptcy shall have all the

(1) Law Rep. 5 Ch. 473.

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powers of a judge of Her Majesty's High Court of Chancery, and that the orders of such judge may be enforced accordingly in manner prescribed." He then referred to s. 72, and went on to say (p. 480): "I have no doubt it was the intention of the legislature that the Bankruptcy Courts should be complete and sufficient in themselves; and that they should, for the purpose of making a complete distribution of the bankrupt's property, exercise at least all the powers possessed by any judge of the Court of Chancery." Therefore, if you examine *Ex parte Anderson* (1), you find that the decision was based upon the conjoint operation of the two sections, 66 and 72. As regards the power of the Court of Bankruptcy to grant injunctions, the Judicature Act of 1873 has a very important bearing, for sub-s. 5 of s. 24 provides that: "No cause or proceeding at any time pending in the High Court of Justice or before the Court of Appeal shall be restrained by prohibition or injunction," that is, no proceeding pending in any branch of the High Court shall be restrained by injunction. By the 3rd section of that Act the Court of Bankruptcy was made a part of the High Court, and therefore, if s. 3 had stood unrepealed, there would have been, as was pointed out by Mellish, L.J., in *Ex parte Ditton* (2), this extraordinary anomaly, that, though the London Court of Bankruptcy would not have had the power to interfere by injunction to restrain proceedings in the High Court, a county court judge could have done so. Consequently by s. 9 of the Judicature Act of 1875, that provision of the Act of 1873 which made the London Court of Bankruptcy part of the High Court was repealed, and the powers which had been in abeyance since the Act of 1873 was passed then reverted to it. Consequently in *Ex parte Ditton* (2), which was decided shortly after the Act of 1875 came into operation, the power of the London Bankruptcy Court to restrain proceedings in the High Court was recognised. So matters remained down to the passing of the Act of 1883. The 102nd section of the Act of 1883 corresponds with the 72nd section of the Act of 1869, as regards the subject-matter of the jurisdiction of the Courts of Bankruptcy. But, before the Court can have this power of granting injunctions, there must be some provision corresponding

(1) Law Rep. 5 Ch. 473. (2) 1 Ch. D. 557.

to s. 66 of the Act of 1869; s. 72 standing alone would not have given the power. What is there in the Act of 1883 which corresponds to s. 66 of the Act of 1869? Sect. 100 is the corresponding section, but it falls far short of s. 66. Instead of conferring on the county court judges all the powers of a judge of the High Court of Chancery, s. 100 gives them only "all the powers and jurisdiction of the High Court." The powers and jurisdiction of the High Court are limited by s. 24, sub-s. 5, of the Judicature Act of 1873. The judges of the High Court have no power to restrain by injunction proceedings in any other branch of the High Court. It appears to me, therefore, that s. 100 does not confer upon the county court judges in bankruptcy such an authority as they had under the Act of 1869, and I am of opinion that the county court judge was perfectly right in refusing to make the order which he was asked to make in this case, upon the ground that he had no jurisdiction to make it. I entirely concur with the Master of the Rolls that the subject-matter of the action of *Reynolds* v. *Barnett* can be decided better by the High Court than by the county court.

BOWEN, L.J. I should add nothing to what has been said, were it not that we unfortunately differ from the conclusions arrived at by the Court below, and out of respect to them I think it right for me to express my opinion.

The question which arises in the action is one which the county court in bankruptcy had unquestionably jurisdiction to decide. But there was an action pending in the High Court raising the very same point. The county court judge, who was clothed with jurisdiction to deal with the case before him, was asked to go on with the trial of it, notwithstanding that there was the action pending in the High Court, and he exercised his discretion by refusing to try it at that moment, by expressing an opinion that the action which was then pending in the High Court would properly decide the question, and by determining to abide the issue of that action. Now the Divisional Court sitting in bankruptcy not only overruled that discretion of the learned county court judge, but they went further, and issued an injunction restraining the proceedings in the action in the High Court. I think, for

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the reasons already given, that they were wrong in considering that, so far as the judge had a discretion, he exercised it wrongly. The discretion of a bankruptcy judge ought not lightly to be overruled. He knows the whole story of the bankruptcy, and he is peculiarly fitted to judge whether a particular case can best be dealt with in the High Court or by himself. In any event I should have thought that the Divisional Court were wrong in interfering with the view which the county court judge took of the case.

But we ought not, I think, to stop there, because the Divisional Court, sitting as a Court of Appeal in Bankruptcy, have laid down and acted upon the rule, that an injunction can be issued by a county court in bankruptcy to restrain the proceedings in an action pending in the High Court, when the question which arises is one with which the Bankruptcy Court can deal. It seems to me, as a matter of law, that the Divisional Court were wrong. There is now no power in the county courts in bankruptcy to restrain the proceedings in an action pending in the High Court. In old times the Courts of Bankruptcy used to issue such injunctions, but the power to do so belonged to them because the judges of the Bankruptcy Court were also judges of the Court of Chancery. But, when you come to the Act of 1869, the London Court of Bankruptcy only obtained its power to issue such injunctions by a combination of ss. 65 and 72, and a county court in bankruptcy only obtained its power by virtue of ss. 72 and 66. I think it is vital to remark that the injunctions which were issued under the Act of 1869 were issued under an Act which contained those two sections, 65 and 66, which respectively clothed the London Court of Bankruptcy and the county courts in bankruptcy for the purposes of their bankruptcy jurisdiction with all the powers and jurisdiction of a judge of the Court of Chancery.

The cases which have been relied upon as shewing that the power to grant such injunctions did not arise under ss. 65 and 66, but under s. 72, do not, I think, prove anything of the sort. In all those cases the question was whether the subject-matter was within the jurisdiction of the Bankruptcy Court, and s. 72 was rightly referred to as deciding that question. It was conceded that, so soon as the subject-matter was brought within the juris-

diction of the Bankruptcy Court, by satisfying s. 72, ss. 65 and 66 would apply, and would enable the Bankruptcy Court to restrain actions in the High Court. But both ss. 65 and 66 have now disappeared. The Act of 1869 has disappeared, and we have to deal with a new Act which contains no similar sections. In that new Act there is no doubt a section corresponding to s. 72 of the old Act. The present question accordingly is within the jurisdiction of the Court of Bankruptcy to decide. But where is there in the Act of 1883 any section similar to that which before that Act clothed a local court of bankruptcy with the power of enforcing its jurisdiction by restraining actions in the High Court? The London Court of Bankruptcy, it is admitted, has no such power, because it is now made a part of the High Court, and it is well known that no division of the High Court can restrain an action in another division. But it is said that a county court judge has the power of restraining actions reserved to him, although the London Bankruptcy Court has not, and the argument is founded upon s. 100 of the new Act. Mr. Bigham in the first place argues that the power of issuing an injunction is preserved by the words "the ordinary powers of the Court." He says that by the interpretation clause (s. 168) "the Court" is to include the county courts in bankruptcy. That is not perfectly accurate, because the interpretation clause only provides that "'the Court' means the Court having jurisdiction in bankruptcy under this Act, unless the context otherwise requires." It seems to me that in s. 100 the context overrides the interpretation given in the interpretation clause. Next Mr. Bigham said that the county court retained its power to issue injunctions by virtue of the words "all the powers and jurisdiction of the High Court." But the powers and jurisdiction of the High Court do not enable a judge of that Court when sitting in one division to restrain an action in another division. On both these grounds, therefore, I think the argument of Mr. Bigham fails. There being no words in the present Bankruptcy Act to clothe the county courts in bankruptcy with the power which they formerly had of restraining actions in the High Court, I think that the Divisional Court sitting in Bankruptcy in assuming to exercise that power were wrong. The danger, which at first sight strikes one as possible,

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that there might be a conflict of jurisdiction between the High Court and a local court, each hurrying to decide the same question, can always be avoided by an application to the High Court to stay the proceedings in the action brought there until the bankruptcy judge has discharged his function, or by an application to the bankruptcy judge, who, I think, would in most cases wisely exercise his discretion by staying his hand until the High Court had decided the point.

Appeal allowed.

Solicitors for appellants: *Scott & Barham.*
Solicitors for trustee: *Fox & Page.*

W. L. C.

May 8.

[IN THE COURT OF APPEAL.]

EX PARTE BOARD OF TRADE. IN RE PARKER.

Bankruptcy—Official Receiver—Powers when acting as Trustee—Power to sell Bankrupt's Property—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 10, 20, 21, 54, 56, 68–70, 121.

The official receiver, when acting as trustee in a bankruptcy in the interval between the adjudication and the appointment of a trustee by the creditors, has power to sell the bankrupt's property, even though it be not of a perishable nature.

Decision of Cave, J. (14 Q. B. D. 407), reversed.

APPEAL from the order of Cave, J. (1), that the official receiver should pay over to the trustees appointed by the creditors in this bankruptcy the fee of 6 per cent. which he had retained out of the proceeds of the sale of furniture of the bankrupts which he had sold between the order of adjudication, made on the 20th of March, 1884, and the appointment of trustees by the creditors on the 18th of April. Cave, J., held that, on the true construction of the Bankruptcy Act, 1883, the official receiver was not authorized to make the sale.

The Board of Trade appealed.

April 25, 27. *Sir F. Herschell, S.G.*, and *Muir Mackenzie*, for the appellants. It is not denied that the sale was an advantageous

(1) Reported 14 Q. B. D. 407.

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one to the estate: the only question is whether the fee of 6 per cent. ought to be paid. If there was no power to make the sale, of course the fee is not payable. The important question is whether there was power to make the sale. An official receiver is a public official, an officer of the Board of Trade, as well as an officer of the Court. Sub-s. 1 of s. 20 provides that, on the debtor being adjudged bankrupt, his property shall vest in a trustee. Sub-s. 1 of s. 54 says that "until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act." This is without any limitation, and the decision of Cave, J., renders these words a nullity. Sect. 56 says that the trustee may "sell all or any part of the property of the bankrupt," and this applies literally to the trustee for the time being, whoever he is. The judgment of Cave, J., rests on sub-s. 1 (*a*) of s. 70, which provides that it shall be the duty of the official receiver "pending the appointment of a trustee, to act as interim receiver of the debtor's estate, and, where a special manager is not appointed, as manager thereof," and sub-s. 2, "for the purposes of his duties as interim receiver or manager the official receiver shall have the same powers as if he were a receiver and manager appointed by the High Court." Cave, J., held that this controls and limits the provisions of ss. 54 and 56, and that, pending the appointment of a trustee, even after an adjudication, the official receiver, though he is the trustee, has only the powers of an interim receiver and manager. This is not the true construction of s. 70. That section contains a general statement of the duties and powers of the official receiver, and, if he did not become trustee, he would have no other duties or powers. In every case that would be so until adjudication, and in many cases an adjudication is not made at all, the creditors accepting, under the provisions of s. 18, a composition or scheme of arrangement of the debtor's affairs. But at any rate the words of s. 70 are not sufficient to limit the clear language of ss. 54 and 56. No doubt sub-s. 5 of s. 21 provides that "the official receiver shall not, save as by this Act provided, be the trustee of the bankrupt's property," but that only means that the creditors are not to appoint him trustee. If the judgment of Cave, J., is right, it would be impossible to carry out the provisions of s. 121 for the administration of small bankruptcies. In such cases the

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official receiver is to be the only trustee, and he would not be able to sell the bankrupt's property. The words "pending the appointment of a trustee" in s. 70, mean the appointment of a trustee by the creditors, and they apply to all bankruptcies, including small bankruptcies under s. 121. The words "subject to the provisions of the Act," in s. 56 refer to the restrictions imposed by s. 57 on the powers of the trustee.

J. E. Linklater (*Arthur Charles, Q.C.*, with him), for the trustees. The Solicitor General has taken the adjudication to be the dividing point at which a change in the administration of a debtor's estate takes place, and the official receiver becomes clothed with powers which he did not previously possess. There are four distinct periods into which the proceedings in a bankruptcy may divided,—(1) the period of receivership pure and simple, from the presentation of the petition up to the making of a receiving order. Sect. 10 gives the Court power to appoint the official receiver to be interim receiver of the debtor's property at any time after the presentation of the petition, if it is shewn to be necessary for the protection of the estate; (2) the period of receivership and management by the official receiver, which lasts from the making of a receiving order up to the appointment of a trustee by the creditors; (3) the period of general administration by the trustee and realization and distribution of the bankrupt's estate; (4) the period after the release of the creditors' trustee, upon which the official receiver, under s. 82, becomes trustee in order that the legal estate in any outstanding property of the bankrupt may vest in him.

By the order of adjudication the bankrupt's property is taken out of him and vests in some other person as trustee, but s. 70 is the governing section which regulates the management of the estate up to the appointment of a trustee by the creditors. The official receiver becomes trustee on the adjudication only for the purpose of vesting in him the property of the bankrupt. This is necessary in order to carry out the provisions of s. 20 (1), that, on the adjudication, the property of the bankrupt "shall vest in a trustee." On the appointment of a trustee by the creditors the property of the bankrupt passes from the official receiver to him. In the case of a trustee appointed by the creditors his appoint-

ment takes effect from the date of the certificate of the Board of Trade: s. 21 (2), (4); but when the official receiver becomes trustee on the adjudication, no such certificate is required. And s. 21 (5) prohibits the appointment of the official receiver as trustee. The official receiver is not to be the trustee who is to direct the administration and realization of the bankrupt's property, except when he acts as trustee during any vacancy in the office after a trustee has been appointed by the creditors, or, in the case of small bankruptcies, under s. 121. "Pending the appointment of a trustee" in s. 70 means pending the appointment of a trustee by the creditors, or by the Board of Trade under s. 21 (6) in case the creditors make no appointment. In both these cases the Board of Trade must give a certificate of the appointment. During the period of management, between the receiving order and the adjudication, s. 12 enables the official receiver to appoint a special manager of the debtor's estate or business, but this section does not apply to the first period. If the official receiver is appointed interim receiver under s. 10, it is necessary that a fresh order should be made appointing him receiver when a receiving order is made under s. 9. This is shewn by Forms 14 and 29 in the appendix to the Bankruptcy Rules, 1883. The whole policy of the Act is that, until a trustee is appointed by the creditors, there shall be nothing but management by the official receiver. If the official receiver in his character of trustee under s. 54 can sell the property of the bankrupt immediately after an adjudication is made, in most cases the creditors would have no opportunity of accepting a composition or scheme of arrangement under s. 18. There would of course be a power to sell perishable goods; that would be incident to the power of management; and, if the circumstances required that a sale should be made of any other kind of property, the Court would, under s. 102, have a general jurisdiction to authorize the official receiver, who under s. 66 is its own officer, to sell. The policy of the Act is that the wishes of the creditors are to be consulted at every step of the proceedings. This is shewn by ss. 15 and 89. Sect. 70 takes effect immediately on the making of a receiving order, and sub-s. 2 limits the powers of the official receiver when he becomes trustee on the adjudication. If he has

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the power of sale which it is asserted that he has, the creditors will be deprived of the control which the Act intended to give them. If the bankruptcy petition is presented by the debtor himself, a receiving order would under s. 8 be made at once, and an adjudication might possibly be made before the creditors could know of the making of the receiving order, and the bankrupt's property might be sold before they could interfere. They could do nothing until they had proved their debts. The adjudication is really a comparatively insignificant step in the proceedings. Whether there is or is not an adjudication, there must be a public examination of the debtor: ss. 17, 18; and offences which would under s. 28 disentitle a bankrupt to an order of discharge would also under s. 18 prevent the Court from approving of a composition or scheme of arrangement. The receiving order is the dividing line with regard to the validity of executions, and also with regard to the relation back of the title of the trustee. The only thing which depends on the adjudication is the divesting of the property of the bankrupt. During the period between the receiving order and the adjudication, s. 56 clearly does not apply, and the official receiver has during that period no power of sale without the order of the Court, except in the case of perishable goods, and that period is generally much longer than the period between the adjudication and the appointment of a trustee, because of the time occupied by the public examination of the debtor, and the meetings of creditors to consider a composition or scheme. Sect. 56 does not apply to the official receiver when he is trustee on the making of an adjudication, and if it does, his powers are limited by s. 70. Sects. 52 and 55, which come under the same heading, "realization of property," as s. 56, clearly cannot apply to the official receiver when he is trustee. Sect. 55 provides that "the certificate of the appointment of the trustee" shall be sufficient authority for the granting of a sequestration, and s. 55 enables the trustee to disclaim onerous property of the bankrupt "within three months after the first appointment of a trustee." Many of the other provisions of the Act as to the powers and duties of the trustee are only applicable to a trustee appointed by the creditors, such as s. 57 (9), s. 58 (5), s. 64, ss. 72, 79, 82. Then s. 68 (3) says that "all expressions referring to the trustee

under a bankruptcy shall, unless the context otherwise requires, or the Act otherwise provides, include the official receiver when acting as trustee." When he becomes ex officio trustee on the making of an adjudication, he is not "acting as trustee;" he "acts as trustee" only during a vacancy in the office after the appointment of a trustee by the creditors. No difficulty really arises with regard to s. 121. That is a provision standing per se, and the intention is that in small bankruptcies the official receiver shall be the only trustee, unless the creditors resolve otherwise.

The result of the Act, looked at as a whole, is that none of the provisions of Part 3, which relate to the "administration of property," apply until after a trustee has been appointed by the creditors, or, in default of their making an appointment, by the Board of Trade.

Sir F. Herschell, S.G., in reply. It is not sufficient for the respondents to shew that some of the sections which give powers to the trustee are not applicable to the official receiver as trustee; they must shew that none of those sections can apply to the official receiver. This they have not done, and their argument has entirely failed to displace the clear and distinct language of ss. 54 and 56. If the respondents are right, the Act need only have said that on the making of an adjudication the property of the bankrupt shall vest in the official receiver as trustee, whereas it has said that "until a trustee is appointed, the official receiver shall be the trustee for the purposes of the Act." A "trustee for the purposes of the Act," must be intended to act in some way. Sect. 70 does not in any way limit s. 54; it does not apply to the duties of the official receiver in the character of trustee. The argument founded on s. 121 has not been answered. The words "subject to the provisions of this Act," in s. 56, were required in order to make it work consistently with s. 57.

Cur. adv. vult.

May 8. BRETT, M.R. In this bankruptcy a receiving order was made, and an official receiver was thereby constituted. An adjudication of bankruptcy was afterwards made, and, before a trustee had been appointed by the creditors, the official receiver sold certain property of the bankrupts.

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It is not denied by anyone that that sale was a beneficial sale for the estate, so beneficial that the creditors' trustee has adopted it. He does not deny that it was a valuable sale, and it cannot be doubted that under the circumstances it was for the benefit of the estate that the official receiver should make the sale. The dispute is about a very small matter. Yet, like many such disputes, in order to settle it, the parties raise a very important question.

The dispute is this. The creditors' trustee, although he does not disapprove of the sale, objects to pay the commission of 6 per cent. to the official receiver. But, in order to shew that he is right in disputing the payment of 6 per cent., he takes the ground that the official receiver had no right to sell at all. I am not sure that we might not have been spared the necessity of deciding this point now, if the objection had been taken that the trustee cannot adopt the sale as valid, and yet say, "You had no right to sell, and, because you have no right to sell, you are not entitled to be paid the 6 per cent." But that objection has not been taken, so we may pass it by. The question before us is whether the official receiver, being by the Act in terms made trustee on the adjudication, has the power of selling the bankrupt's property before a creditors' trustee is appointed.

The importance of the matter seems to be this. On the one side, it is said that, if he can sell, there is no check upon him. The creditors are not in a position to object to what he is doing; there cannot be a committee of inspection. That, no doubt, is true. But, on the other side, it is said, if that argument is correct, however important it may be, however valuable it may be for the estate, that certain property should be sold at once, though it does not consist of perishable goods, yet it cannot be sold until the lazy creditors have appointed a trustee of their own. That, no doubt, is an important point.

My judgment will rest upon a much used and ordinary rule of construction, which is this, that you are to take the words of an Act of Parliament in their plain and ordinary sense, unless there is something in the context which obliges you to take them in some other larger or more limited sense. The 9th section of this Act provides that "On the making of a receiving order an official

receiver shall be thereby constituted receiver of the property of the debtor." That is the first consequence of a receiving order. The official receivers are the servants of the Board of Trade. They have nothing to do with any particular bankruptcy until they are appointed to act in it, and this is the way in which they are appointed. The receiving order brings in, not an abstract official receiver, but a specified person who is named official receiver.

Then by sub-s. 1 of s. 20, "where a receiving order is made against a debtor," (which order, as we have seen, has appointed an official receiver), "then if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt," or do some other things, "the Court shall adjudge the debtor bankrupt, and thereupon the property of the bankrupt shall become divisible amongst his creditors and shall vest in a trustee." The moment therefore that Court adjudges the debtor a bankrupt, his property is to vest in a trustee; up to this time we had only got an official receiver. Now we must look for a trustee. We go on to s. 54, and that says that, "until a trustee is appointed" (and I cannot doubt that that means a creditors' trustee), "the official receiver shall be the trustee for the purposes of this Act, and immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee." Sect. 20 had said that the property shall "vest in *a* trustee;" s. 54 says that the property of the bankrupt shall vest in "*the* trustee." What trustee? There is no one but the official receiver at that moment. "Until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act." The property of the bankrupt therefore vests in the official receiver who has just been appointed.

Now what can that trustee do? Let us go to s. 56, which says, "subject to the provisions of this Act, the trustee may do all or any of the following things. (1.) Sell all or any part of the property of the bankrupt." Let us take the language from the beginning to the end in its plain ordinary sense. The official receiver is appointed. The adjudication is made. The official receiver, until a creditors' trustee is appointed, is to be the trustee, and the property of the bankrupt is to vest in him. What may

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a trustee, subject to the provisions of the Act, do? He may sell the bankrupt's property. What is there to shew that, when s. 56 speaks of the trustee, you must read into it the words "not all trustees, but only some trustees;" not the official receiver whilst he is acting as trustee at the beginning of the bankruptcy, but only the creditors' trustee; and then, when a difficulty arises from this construction, say, the official receiver may under certain circumstances be a trustee who can sell the bankrupt's property, that is, when a vacancy arises after a creditors' trustee has been appointed? All these things must be read into s. 56, if the word "trustee" does not include the official receiver when he is, under s. 54, acting as trustee at the beginning of the bankruptcy.

Now let us see what arguments were adduced to exclude the application of the old and simple rule of construction to which I referred, but which in the admirably clear and concise but exhaustive argument of Mr. Linklater was treated almost with scorn and contempt, because, I suppose, it is old and simple. To my mind things are not the worse for being old and simple. Let us see what the arguments were. I do not profess to go through them all. They were minute to a degree. We travelled laboriously through the Act, and looked at almost every section of it. The Act is divided into different heads, and it appears to me that the draftsman has endeavoured to make everything which is applicable to each head exhaustive under that head, and that, therefore, necessarily, when any particular person at different stages of the proceedings has two characters imposed upon him you will find tautology in this sense, that in the descriptions of each of his characters you find some repetition. The great point which Mr. Linklater made was, that he divided the proceedings in a bankruptcy into four periods or stages, and then he endeavoured to shew that during the second stage the official receiver could not be the "trustee" mentioned in the 56th section. Now, with great deference to him, the moment you attempt to divide things in this way, you will probably get into a fallacy. There may be cross divisions. You may divide animals, it is said, into human creatures and beasts. Some people think it is not a very good division, and that the divisions cross each other in some respects. But it does not follow that, because animals are divided

into human creatures and beasts, human creatures cannot be divided into men and women. In my view there are hundreds of divisions of animals besides that of human creatures and beasts, and the divisions cross each other. It did not therefore strike me as very important to shew that there are several main stages in the proceedings in a bankruptcy, because there may be a division of one of those stages into two, and then, I think, Mr. Linklater's argument would fall to the ground.

A great many other difficulties were suggested upon this view, that, if you give the simple literal interpretation to ss. 54 and 56, there will be tautology in other sections of the Act. To my mind that is not fatal to the literal construction, and the mere fact that there are tautologous words in one part of the Act will not justify you in saying that plain words in another part of it are not to be read in their ordinary sense.

An argument was used by the Solicitor General with relation to s. 121, viz., that unless the official receiver, when acting as trustee before the creditors have appointed a trustee, has power to sell the bankrupt's property, there would be great difficulty, an insuperable difficulty he said, in the management of small bankruptcies. That was his great argument. I must confess, as I have already said with regard to some of the arguments of Mr. Linklater, that that argument did not impress me so much as the Solicitor General seemed to think that it ought. It seemed to me that, reading ss. 54 and 56 either way, nevertheless you could work out the management of small bankruptcies as they ought to be worked out under the 121st section. It is not, however, necessary to decide that point, because, assuming that this argument is not correct, what is there to shew that you ought not to read ss. 54 and 56 according to their plain meaning? If the Solicitor General's argument is not adopted, that does not solve the other questions against him; if his argument is right, it is a very strong confirmation of the interpretation which he puts upon the previous sections. But, either way, it does not strike me as a formidable argument.

After a careful examination of the Act I base my judgment absolutely and entirely upon this, that ss. 54 and 56 are plain and simple in their language; that the language giving a power of

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sale to the trustee, includes the official receiver, when acting as trustee, and that there is nothing in any other part of the Act which authorizes the Court to give to those sections any but their plain and simple interpretation. I think, therefore, that the official receiver had, at the time when he sold in the present case, power to sell the property, and that the property passed by virtue of his sale.

It follows that he was entitled to the commission of 6 per cent. If 6 per cent. is more than ought to be allowed on such a sale by the official receiver at such a time, that can be altered, I suppose, by new rules made by the Board of Trade, or, at any rate, by new legislation. But I think we must construe the Act in the ordinary way.

BAGGALLAY, L.J. (after stating the facts, continued):—Mr. Linklater in his able argument divided the history, if I may so call it, of the proceedings in a bankruptcy into several periods. I shall adopt somewhat the same system, although I shall not adopt exactly the same periods, nor do I think that my conclusion with regard to the position of the parties during the different periods will be quite the same as that which he desired to press upon us. He endeavoured to draw a distinction between the powers and duties of the two officials, if I may so call them, the official receiver and the trustee, during the respective periods which he adopted. I will adopt, as the first period, that from the presentation of the petition to the making of the receiving order. In the case of a petition presented by the debtor himself that period vanishes, because, when the petition is presented by the debtor, the receiving order is made at once. But, after the receiving order is made, a certain period elapses before the making of an order of adjudication, and that I regard as the second period. I propose to consider those two periods, and also a third period, viz., that from the adjudication until the appointment of a trustee by the creditors.

Now, the first thing we find is that the Act provides by s. 9 that "on the making of a receiving order" (which ends the first period) "an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed

by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, unless with the leave of the Court." But cases may arise in which, by reason of the bankrupt's absconding, or for some other reason, it may be desirable to appoint a receiver to act before a receiving order is made, and that is provided for by the 10th section, which covers this period from the presentation of the petition up to the making of a receiving order, and enables the Court to "appoint the official receiver to be interim receiver of the property of the debtor." In the old Court of Chancery and in the Chancery Division we are well acquainted with the nature of an appointment of an interim receiver; he is to act until such time as a receiver having full powers shall be appointed. It is important to notice the difference between the provisions of the 9th and the 10th sections. The official receiver becomes receiver to all intents and purposes when the receiving order is made. He is not described as interim receiver. But, when he is to be appointed to act until the receiving order is made, he is to be interim receiver. The importance of these words will, I think, be seen when we come to consider the language of the 70th section. That is the only mention of an interim receiver until you come to the 70th section, to which I shall have to refer presently, and the term "interim receiver" is here applied to the official receiver acting in the interval of time between the presentation of the petition and the making of a receiving order.

I now pass on to s. 20, which provides for the adjudication. "Where a receiving order is made against a debtor, then, if the creditors at the first meeting, or any adjournment thereof resolve that the debtor be adjudged bankrupt, or pass no resolution," (and there are some other alternatives), "the Court shall adjudge the debtor bankrupt; and thereupon the property of the bankrupt shall become divisible among his creditors, and shall vest in a trustee." You have not got the words "*the* trustee" there, but "*a* trustee."

Under ordinary circumstances there is, first, the resolution of the creditors that the debtor shall be adjudged bankrupt, and

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then the order of the Court, which is called the order of adjudication. But here it is only said that "the property of the bankrupt shall vest in *a* trustee."

Then the 21st section provides for the appointment of a trustee; "where a debtor is adjudged bankrupt, or the creditors have resolved that he be adjudged bankrupt," they have the power of appointing a trustee. It may be that, at the same meeting at which the resolution is passed that the debtor be adjudged bankrupt, a resolution may also be passed appointing a trustee, and, therefore, it may possibly happen that a trustee is appointed by the creditors before the order of adjudication is actually made by the Court. This would very rarely happen, but it seems to explain some of the provisions of the Act. The next section provides for the appointment of a committee of inspection by the creditors, but I need not refer to the powers and duties of the committee of inspection. We have arrived then at this, that, upon the making of the order of adjudication, the property of the bankrupt is to vest in a trustee. We have got the power to appoint a trustee, which would not, under ordinary circumstances, be exercised until some little time after the order of adjudication. We have, therefore, a period of time during which thus far there is no provision made for a trustee, or for any person to act in the capacity of a trustee.

Then we come to the 54th section. The 54th and 55th sections form two of a series, eight in all, which are headed "Realisation of Property," and which confer upon the trustee the power of realizing the assets of the bankrupt. The 1st sub-section of s. 54 says that "until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act." I cannot read that as meaning anything else than that he shall be the trustee for all the purposes of the Act. Of course, if we find anything afterwards which negatives his power to act for any of the purposes of the Act, effect must be given to it. But, primâ facie, until a trustee is appointed, the official receiver is to be the trustee for, as it appears to me, all the purposes of the Act. And not only so, but "immediately upon a debtor being adjudged bankrupt, the property of the bankrupt shall vest in *the* trustee." Who is "the trustee" there? It must be the official receiver in

all those cases in which a trustee is not appointed until after the adjudication. In the present case, the period from the 20th of March to the 18th of April elapsed before a trustee was appointed by the creditors. As, therefore, on the order of adjudication the property of the bankrupt is to vest in the trustee, there can be no other interpretation put upon the language than that, upon the adjudication, the property of the bankrupt vests in the official receiver quâ trustee, unless a trustee has been appointed by the creditors; and that is, I think, borne out by the next two sub-sections. Sub-s. 2 says, "On the appointment of a trustee," that I apprehend means upon the appointment of a trustee by the creditors, "the property shall forthwith pass to and vest in the trustee appointed," that is, it shall pass from the official receiver, in whom it vested on the adjudication, to, and vest in, the trustee appointed by the creditors. The same thing would happen upon any subsequent appointment of a trustee. In case of a vacancy in the office of trustee, the property would again pass to the official receiver. But the change of a trustee in the course of a bankruptcy is a matter of rare occurrence. In the great majority of cases the same person remains trustee from his appointment until the proceedings are closed. Again, as it appears to me, sub-s. 3 strongly confirms this view: "The property of the bankrupt shall pass from trustee to trustee, including under that term the official receiver when he fills the office of trustee, and shall vest in the trustee for the time being during his continuance in office, without any conveyance, assignment, or transfer." It has been suggested that those three sub-sections apply only when there is a vacancy in the office of trustee after a trustee has been appointed by the creditors, and the property vests in the official receiver until a new trustee is appointed. Why should they be thus limited? I can hardly conceive language more clear and distinct than that of s. 54, supplying that which is left vague and open by the 20th and 21st sections. Those sections made no provision for anyone filling the office of trustee until a creditors' trustee was appointed, and s. 54, although it comes late in the Act, supplies the gap. We have a complete chain of trustees provided, viz., the official receiver acting as trustee until a trustee is appointed by the creditors; then the trustee appointed by the creditors;

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and, in case of a subsequent vacancy, the official receiver again becomes the trustee until a new trustee is appointed. Bearing in mind, again, that all this has reference to the realization of the bankrupt's property, what do we find next? Sect. 56 provides that "the trustee may do all or any of the following things: (1) sell all or any part of the property of the bankrupt." There you have language large and ample enough to authorize the doing of that which the official receiver has done in the present case. And, moreover, though I hardly think it was wanted, sub-s. 4, repeating to some extent what has been previously provided, says that "the trustee may exercise any powers the capacity to exercise which is vested in the trustee under this Act," that is, the person who is the trustee for the time being may exercise them. It is unnecessary to delay longer over this section, which appears to me to confer upon the official receiver the power under which he assumed to act in the present case.

Then we find ss. 66 to 71, upon which an argument has been founded which appears to have prevailed with Cave, J. Sects. 66 to 71 are all included under one general head: "Part IV., Official Receivers and Staff of Board of Trade." Sects. 66 and 67 give general powers to the Board of Trade to appoint official receivers, to remove the persons so appointed, and to appoint deputies. Then we come to s. 68, sub-s. 1 of which says: "The duties of the official receiver shall have relation both to the conduct of the debtor and to the administration of his estate." And sub-s. 3 says: "All expressions referring to the trustee under a bankruptcy shall, unless the context otherwise requires, or the Act otherwise provides, include the official receiver when acting as trustee." The 69th section merely defines the duty of the official receiver as regards the conduct of the debtor, and then comes s. 70, which has been mainly relied upon by Mr. Linklater here, as it was by himself and Mr. Charles in the Court below. It commences as follows: "(1.) As regards the estate of a debtor it shall be the duty of the official receiver: (*a.*) Pending the appointment of a trustee, to act as interim receiver of the debtor's estate, and, where a special manager is not appointed, as manager thereof." It is to be observed that here the term "interim receiver," and the acting of the official receiver as interim receiver of the debtor's

estate, are not limited, as in s. 10, by the making of a receiving order, but cover a longer period. This is a very useful provision, enabling the official receiver, when there is no trustee, to act as manager of the debtor's estate. It may be (in fact in the great majority of cases it is so) that the bankrupt is carrying on some business, and that it is to the interest of the creditors that it shall not be at once stopped and wound up, but shall be allowed to be carried on for a time, and this section enables the official receiver to carry it on. Sect. 70 then provides for a variety of other matters, to which I need not refer, till we come to the sub-s. (*g*), which authorizes the official receiver to act as trustee during any vacancy in the office of trustee. It is somewhat singular that there is another clause in the Act distinctly providing for the same thing. Sect. 87, sub-s. 4, says: "During any vacancy in the office of trustee the official receiver shall act as trustee." One might be surprised to find the inconsistency to which I have just referred in the provisions as to the functions of the official receiver at different periods of time, yet here we find the same provision introduced twice over—viz., that the official receiver is to act as trustee during any vacancy in the office. Down to s. 70 no provision has been made as to what is to be done in the event of a vacancy, but s. 70, sub-s. (*g*), and s. 87, sub-s. 4, both provide for it. Reliance has been placed by the respondents' counsel on sub-s. 2 of s. 70, which is introduced in the following words: "For the purpose of his duties as interim receiver or manager the official receiver shall have the same powers as if he were a receiver and manager appointed by the High Court." That has been translated by the respondents' counsel, and the learned judge in the Court below seems to have adopted that view, as meaning that the official receiver is to have the same powers as a trustee only when he is interim receiver. But, as I read that clause, it simply deals with the duties of the official receiver when he is acting as interim receiver, and in no way deals with his duties when he is acting as trustee.

We find in the subsequent sections of the Act, from the 72nd to the 91st, a series of provisions with regard to the remuneration, the duties, and the position of the trustee. There are also other sections affecting the official receiver when he is acting as

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an interim receiver. While he is acting as an interim receiver, he is in the same position as if he was a receiver and manager appointed by the High Court. I can see no reason why, when he is acting as trustee, he is to be treated as having less powers conferred upon him than any other trustee. It seems to me that, in the clearest possible terms, the Act provides that he is to have the same powers as any other trustee when he is acting as trustee, or rather when, according to the scheme of the Act, he is the trustee. The Act in two places provides for the official receiver acting as trustee during a vacancy, but in s. 54 he is declared to be "the trustee" until a trustee is appointed.

Adopting the rule which the Master of the Rolls has mentioned, viz., when, in those sections of an Act which confer powers on a public official, you have those powers expressed in terms which, taken by themselves, can admit of no doubt, if it is sought to find in some other part of the Act something which is to reduce the powers so conferred upon him, it must be expressed in the most clear and distinct language. I cannot find in the 70th section of the Act anything which can thus limit the effect of ss. 54 and 56.

In my opinion, the course pursued by the official receiver in the present case was quite within his powers, and he was quite justified in retaining the 6 per cent. commission, according to table D. of the scale of fees prescribed by the Lord Chancellor, with the sanction of the Treasury, under the authority given by s. 128 of the Act, and it seems to me that the learned judge was in error in directing the amount so retained to be refunded.

No argument was addressed to us as to the propriety of the order of Cave, J., that the costs and expenses of the sale should be paid out of the bankrupts' estate; but, in my view, it is perfectly clear that those costs and expenses are properly payable out of the bankrupts' estate.

As to the argument which the Solicitor General based upon the 121st sect. of the Act, which relates to "Small Bankruptcies," I can understand that, if the respondents' contention was adopted, great inconvenience might have resulted in applying the 121st sect. But I do not, in the view which I have expressed of the construction of the Act, rely upon that. I rely rather upon the general scope of the Act, drawing a clear distinction between the office of

official receiver and the office of trustee, defining the duties and powers of both, and covering periods of time when both offices may be filled by the same person. I base my view upon the general construction of the Act, and I am of opinion that the appeal should be allowed.

BOWEN, L.J. I agree with the opinions of my learned Brothers, and, although in most cases when we differ from the Court below we think it right, as a matter of respect to the judge, that each of us should give his opinion separately, still, under the circumstances of this case, and agreeing as I do with the detailed examination which the statute has received at the hands of my learned Brothers, I do not think it necessary to add anything.

Linklater, asked for leave to appeal to the House of Lords.

THE COURT gave leave, if the creditors, at a meeting summoned by the trustees for the purpose, should approve of an appeal being brought.

Solicitor for Board of Trade: *W. Murton.*
Solicitors for trustees: *Linklater & Co.*

W. L. C.

[IN THE COURT OF APPEAL.]

May 8.

EX PARTE CAMPBELL. IN RE WALLACE.

Bankruptcy—Composition or Scheme of Arrangement—Approval of Court—Discretion of Registrar—Wishes of Creditors—Evidence of Facts justifying Court in refusing to approve—Report of Official Receiver—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 18, 28.

The report of the official receiver is, under s. 18 of the Bankruptcy Act, 1883 (as it is under s. 28), primâ facie evidence of the statements contained in it.

The registrar, in deciding whether he will or will not approve a composition or scheme of arrangement accepted by the creditors of a bankrupt, is exercising a judicial discretion, and the Court of Appeal will not readily set aside his order.

It is the duty of the registrar to form his own judgment, and not to be influenced by the wishes of the creditors.

APPEAL from the refusal of Mr. Registrar Pepys to approve of a composition accepted by the creditors of J. J. Wallace, under the provisions of s. 18 of the Bankruptcy Act, 1883.

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EX PARTE CAMPBELL. IN RE WALLACE.

Wallace was a shipbroker. On the 17th of April, 1884, a receiving order was made against him on a creditor's petition. His statement of affairs shewed that his debts to unsecured and partly secured creditors amounted to 16,013*l.* 4*s.* 10*d.*, and that his only asset was 740*l.*, the estimated surplus of securities in the hands of fully secured creditors. The creditors resolved to accept a composition of 1*s.* in the pound, which was to be secured to the satisfaction of the official receiver. All preferential debts and the costs of the proceedings were also to be paid in full.

The official receiver reported to the Court (inter alia) as follows:—

"That no proper books of account of a date subsequent to June, 1882, have been produced to him, nor do any entries appear in the ledger; that no cash book containing any entries between September, 1882, and January, 1884, has been produced, and the entries since that date have not been posted; and on these grounds it is reported that the debtor has omitted to keep such books as sufficiently disclose his business transactions and financial position during the three years immediately before these proceedings.

"That the debtor admitted in his public examination, that he was bankrupt in 1877 with liabilities amounting to 13,702*l.*, that his creditors were paid a dividend of 4½*d.* in the pound, and that he obtained his discharge on the 21st of November, 1877.

"That the debtor also filed a petition for the liquidation of his affairs by arrangement in 1881, and it appears from his public examination in the present proceedings that his liabilities on that occasion amounted to about 10,000*l.*, and in that liquidation no dividend has been paid, and it does not appear that the debtor obtained a release.

"That the debtor, in his deficiency account, estimates his earnings for the three and a half years from March, 1881, to October, 1884, to have amounted to 2727*l.*, and his drawings or expenditure during the same period are stated in the same account to have amounted to 4200*l.*, and it is submitted, therefore, that the debtor has contributed to his insolvency by unjustifiable extravagance in living.

"That, having regard solely to the assets and liabilities of the

debtor, this composition may be reasonable and calculated to benefit the general body of creditors; but, taking into consideration the several matters hereinbefore set forth, the official receiver submits to the Court that the proposed composition should not be approved."

The official receiver, as proxy for some of the creditors, had voted in favour of the acceptance of the composition.

No creditor opposed the approval of the composition, but some of the creditors appeared in support of the application for approval.

The registrar made the following order: "The Court, being of opinion that the facts detailed in the report of the official receiver, and not disproved by any other evidence, would have justified the Court in qualifying or suspending the debtor's order of discharge, doth hereby refuse to approve the said composition."

Messrs. J. Campbell & Co. and ten other creditors, whose debts together amounted to 9873*l.*, appealed.

Herbert Reed, for the appellants. No creditor opposed the approval of the composition by the Court, and none opposes now. The official receiver himself says that it is for the benefit of the creditors. It is their only chance of getting anything paid to them. The 1*s.* in the pound is to be secured, and is to be paid free from any deductions. On the question whether the Court shall approve of a scheme of arrangement or a composition, the report of the official receiver is not primâ facie evidence of the statements contained in it, as it is with reference to the granting of the discharge of a bankrupt. In this respect s. 18 differs from s. 28. (1) Evidence ought, therefore, to have been adduced by

(1) Sect. 18 provides (inter alia) (2) that a composition or scheme accepted by the creditors shall not be binding on the creditors unless (inter alia) it is approved by the Court. "(5.) The Court shall, before approving a composition or scheme, hear a report of the official receiver as to the terms of the composition or scheme and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor."

"(6.) If the Court is of opinion that the terms of the composition or scheme are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court is required under this Act where the debtor is adjudged bankrupt to refuse his discharge, the Court shall, or if

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the official receiver of the truth of the statements contained in his report, and the debtor ought to have an opportunity of disproving those statements. He did not know that the official receiver intended to oppose the approval of the scheme; he was misled by the fact that the official receiver had already voted in favour of it. The wishes of the creditors ought to be attended to.

Sidney Woolf, for the debtor.

Arnold White, for the official receiver, was not heard.

BRETT, M.R. A report having been made by the official receiver to the registrar, the registrar was entitled to exercise his discretion whether he would or would not approve of the composition, and when he, acting in his judicial capacity, has exercised his discretion, it would require a very strong case to induce this Court to overrule his decision. It is said that the report of the official receiver is not under s. 18 primâ facie evidence of the statements contained in it. By s. 28 the report is made primâ facie evidence for the purposes of that section, and it seems to me that whatever mode of proof of the facts referred to in

any such facts are proved as would under this Act justify the Court in refusing, qualifying, or suspending the debtor's discharge, the Court may, in its discretion, refuse to approve the composition or scheme."

Sect. 28 provides (2) that on the hearing of a bankrupt's application for an order of discharge, "the Court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property: Provided that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanor under this Act, or Part II. of the Debtors Act, 1869, or any amendment thereof, and shall, on proof of any of the facts hereinafter mentioned, either refuse the order, or suspend the operation of the order for a specified time, or grant an order of discharge subject to such conditions as aforesaid."

Sub-s. 3 states "the facts hereinbefore referred to," and they include the omission of the bankrupt to keep proper books of account; "(*d*) that the bankrupt has brought on his bankruptcy by rash and hazardous speculations or unjustifiable extravagance in living;" "(*g*) that the bankrupt has on any previous occasion been adjudged bankrupt, or made a statutory composition or arrangement with his creditors."

And by sub-s. 4, "for the purposes of this section the report of the official receiver shall be primâ facie evidence of the statements therein contained."

sub-s. 3 of s. 28 is sufficient for the purposes of that section, is by sub-s. 6 of s. 18 made sufficient evidence of the same facts for the purposes of that sub-section. The report of the official receiver is, therefore, primâ facie evidence of those facts. How then can we say that the registrar has not exercised his discretion properly in the present case? In my opinion, the not keeping of books is one of the greatest offences which can be committed by a trader. It is said that it is a very common thing for traders not to keep books; it may be so in the case of traders who become bankrupt. It shews the utter recklessness of a man who does so; it shews that he is carrying on business with an utter disregard of the interests of anyone but himself. You may be almost certain that a trader who does not keep books will sooner or later become a bankrupt. My own conclusion is that in the present case the bankrupt drew out all the money which he could lay his hands upon, and I think that the official receiver might well have reported that he had been a reckless trader for years. It is said that we ought to set aside the registrar's decision because the creditors desire it. This facility on the part of creditors is one of the things which the present Bankruptcy Act was intended to prevent. If we were to listen to it we should be frittering away the Act. It is not generosity on the part of creditors, it is mere laziness; when they think a debt is a bad one they would rather write it off at once than take any trouble about the debtor's estate. The wish of the creditors is no argument at all, and we cannot listen to it for a moment. It is the duty of the registrar to form his own judgment, and to protect the lazy creditors against themselves.

BAGGALLAY, L.J., and BOWEN, L.J., concurred.

Appeal dismissed. The official receiver to have his costs out of the deposit.

Solicitor for appellants and for debtor: *W. Bagot Harte.*
Solicitor for official receiver: *W. W. Aldridge.*

W. L. C.

1885
May 21.

SANDERS *v.* DAVIS.

Trade Fixtures—Mortgage—Lease by Mortgagor after Mortgage—Rights of Tenant.

A mortgagor in possession of premises let them to a tenant who brought on to them certain trade fixtures. The mortgagee subsequently entered and sold the premises under the power of sale contained in the mortgage :—

Held, that the fixtures did not pass under the mortgage, but remained the property of the tenant.

SPECIAL CASE, from which the following facts appeared :—

By an indenture of mortgage dated the 1st of May, 1878, made between Henry Bennett of the one part, and the defendant of the other part, a messuage therein described was granted and released by the said Henry Bennett to the defendant, to secure repayment of 500*l.* with interest at 5 per cent. per annum.

The premises were then occupied by one Snuth, as tenant, who carried on therein the trade of a grocer, and had placed on the ground floor the ordinary fixtures used by grocers. In September, 1881, Snuth determined his tenancy and removed his fixtures.

In September, 1881, Henry Bennett, the mortgagor, died, and the equity of redemption passed by his will, and ultimately by sales and various mesne assignments became vested in six different persons as tenants in common. These tenants in common had entered into no covenant to pay the mortgage debt of 500*l.*

In March, 1883, James Hunt became yearly tenant of the premises to the six tenants in common, and, on entering into possession, placed in the shop certain counters, shelves, partitions of wood, and glass gas pipes and burners, bells, and window blinds for the purpose of carrying on the trade of a draper and haberdasher.

In June, 1883, James Hunt bought an undivided sixth part or share of the premises from one of the tenants in common, and the undivided sixth part or share was conveyed to Hunt, subject as to the entirety to the mortgage for 500*l.*, but he entered into no covenant for payment off of the mortgage debt.

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In August, 1883, Hunt mortgaged in fee the undivided sixth part of the equity of redemption, together with the fixtures then in and upon the premises, to the plaintiff.

The defendant never recognised or adopted the tenancy of Hunt, and in July, 1884, under the power of sale contained in his mortgage deed, he sold and conveyed the premises to a purchaser together with the trade fixtures placed in the shop by Hunt in March, 1883.

It was admitted that the fixtures as between all parties should be taken at 100*l.*; that they were trade fixtures; that they could be moved without injury to the fee; that the plaintiff demanded them from the defendant before the sale and before Hunt gave up possession of the premises, and that the sale of the fee and the fixtures only realised enough to satisfy the mortgage to the defendant.

The question for the opinion of the Court was whether the plaintiff was entitled under the circumstances to recover the value of the fixtures.

Thorne, for the plaintiff. This is not the case of property brought on to the premises by the mortgagor, but of fixtures brought in by a tenant subsequent to the mortgage. They never were the property of the mortgagee, and did not pass under the mortgage, but were covered by the protection accorded to trade fixtures between landlord and tenant.

T. J. Bullen, for the defendant. The tenant has become so since the mortgage, and his rights are subject to those of the mortgagee. The mortgagee is entitled to sell the property, and with it any fixtures that he may find on the premises. He cited *Meux* v. *Jacobs* (1); *Ex parte Cotton* (2); *Cullwick* v. *Swindell*. (3)

Thorne, in reply. The defendant must have known the position of Hunt, and he allowed him to become tenant to the mortgagor, and to bring these fixtures on to the premises. Where the mortgagee does not interfere, but permits the mortgagor to hold himself out as entitled to let the property, it would be a great hardship

(1) Law Rep. 7 H. L. 481. (2) 2 M. D. & De G. 725.
(3) Law Rep. 3 Eq. 249.

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on the tenant to deprive him of his property. *Meux* v. *Jacobs* (1) does not apply, for there the mortgagor was owner of the fixtures.

POLLOCK, B. I have no doubt the plaintiff is entitled to judgment. Between the mortgagor and mortgagee no doubt, unless there is some express reservation, all that is on the land fixed to the freehold, passes under a mortgage of the freehold to the mortgagee. That was the only point decided in *Meux* v. *Jacobs*. (1) The question of the right of a tenant was not raised. Then there are the cases of *Ex parte Cotton* (2) and *Cullwick* v. *Swindell* (3), in which the parties on the one side were partners. It was argued that a person who carries on business with another on premises which have been mortgaged by the latter, ought to be entitled to the trade fixtures. The answer to this contention was that it is not possible in law to say that the fixtures belong to one partner more than to the other, and consequently they belong as much to the partner who is mortgagor as to the one who is a stranger to the mortgage. It is clear, then, that as they are the property of the mortgagor, they pass under the mortgage. The present case is quite different, and does not depend merely on the position and relation of the parties, but on the character of the things. In *Lawton* v. *Salmon* (4) Lord Mansfield said, "All the old cases, some of which agree in the Year Books and Brooke's Abridgment, agree, that whatever is connected with the freehold, as wainscot, furnaces, pictures fixed to the wainscot, even though put up by the tenant, belong to the heir. But there has been a relaxation of the strict rule in that species of cases, for the benefit of trade, between landlord and tenant, that many things may now be taken away which could not be formerly, such as erections for carrying on any trade, marble chimney pieces, and the like, when put up by the tenant." The case we have to consider is one in which the goods are not strictly speaking the property of a tenant, but belong to some one who has come in under an agreement of tenancy with the mortgagor of the premises, and not under any agreement with the mortgagee. Hunt, when he entered on the

(1) Law Rep. 7 H. L. 481.
(2) 2 M. D. & De G. 725.
(3) Law Rep. 3 Eq. 249.
(4) In note to *Fitzherbert* v. *Shaw*, 1 H. Bl. 258.

premises, believed he was entitled to consider himself the tenant, and, in my opinion, whatever he brought on as trade fixtures comes within the spirit of the rule laid down by Lord Mansfield, and adopted in many other cases. I think, therefore, that Hunt would have been entitled to remove these fixtures and that consequently the plaintiff is entitled to judgment.

MANISTY, J. I am of the same opinion. When the mortgage was executed in May, 1878, the premises were in the occupation of a tenant, and at the expiration of his tenancy he had a right to remove, and did remove, his trade fixtures. The mortgagee after this allowed the mortgagor to remain in possession and deal with the property. Now if the defendant had taken possession and let to Hunt, and Hunt had brought trade fixtures on to the premises, he would have been entitled to remove them when his tenancy terminated. I cannot see why a mortgagee should be in a better position in this respect when he permits the mortgagor to deal with the property and let in a tenant. I think he must be taken to have known of the letting to Hunt, and to have acquiesced in it, and consequently he would not have been able to prevent Hunt from removing the fixtures. There must, therefore be judgment for the plaintiff.

Judgment for the plaintiff.

Solicitors for plaintiff: *Church, Rendall, & Co., for H. K. Thorne, Barnstaple.*

Solicitors for defendant: *W. T. Watkins, Bristol.*

A. M.

1885

June 4.

KIMBER *v.* PARAVICINI.

Ecclesiastical Law—Dilapidations—Sequestration of Benefice—Dilapidations of Glebe Buildings—Repairs done by Sequestrator—Ecclesiastical Dilapidations Act, 1871 (34 & 35 *Vict. c.* 43), *ss.* 12–16, 72—*Accounts of Sequestrator, Objection to.*

A benefice having been sequestrated under a writ of sequestration in an action, an inspection of the glebe buildings by the diocesan surveyor was directed by the bishop, and a report made by such surveyor under the Ecclesiastical Dilapidations Act, 1871. The report estimated the cost of the necessary repairs to the buildings at 140*l.*, and no objections were taken to such report under s. 16 of the Act. The sequestrator, being subsequently of opinion that the repairs provided for by the surveyor's report were inadequate, expended on the repairs of the buildings a much larger sum than 140*l.* No inspection or report, except as before mentioned, was ordered by the bishop or made by the surveyor:—

Held, that the sequestrator had no authority to expend on repairs out of the proceeds of the benefice a larger sum than that estimated as necessary by the surveyor's report under the Ecclesiastical Dilapidations Act, 1871, and that such expenditure must be disallowed.

Motion on behalf of the defendant to disallow certain items in the accounts of a sequestrator. The facts were as follows:—

In 1874, writs of sequestration had been issued in the above-mentioned action and two other actions against the same defendant, whereby the rectory of Avening, in the county of Gloucester, of which he was incumbent, had been sequestrated for a total sum of 5559*l.* 10*s.* 2*d.* The writs being lodged with the Bishop of Gloucester and Bristol, the bishop's secretary, a solicitor, was appointed sequestrator. In March, 1884, an order was made by the Queen's Bench Division that the accounts of the sequestrator should be rendered with proper vouchers for all moneys received and disbursed, and that such accounts should be referred to a master with liberty to the defendant to file exceptions to the accounts. Exceptions had been filed by the defendant to various items of the accounts. The ground of such exceptions was in substance that such items had been incurred in respect of repairs to the glebe buildings not authorized by any surveyor's report under the Ecclesiastical Dilapidations Act, 1871.

It appeared from the master's report that, after the sequestration of the living, in October, 1874, the diocesan surveyor, Mr. Maberley, was directed by the bishop, under the Ecclesiastical Dilapidations

Act, 1871, to inspect the glebe buildings and to report on the dilapidations, and estimate the cost of their repair. In November, 1874, the diocesan surveyor sent his report and estimate to the bishop, by which the cost of the necessary repairs, as set forth in a specification annexed to the report, was estimated at 140*l.* No objections to the report were stated to the bishop in accordance with 34 & 35 Vict. c. 43, s. 16, and the report accordingly became final.

In February, 1875, Mr. Maberley vacated his appointment as diocesan surveyor, and a Mr. Waller was appointed to that office. In February, 1875, the sequestrator visited the glebe premises, and from inspection of them arrived *bonâ fide* at the conclusion that very considerable repairs were necessary for the due maintenance of the buildings, and formed the opinion that the report and estimate of Mr. Maberley were wholly inadequate. He accordingly expended from time to time on the repairs of the buildings sums amounting altogether to a total of 780*l.* 18*s.* 10*d.* This expenditure was partly in respect of dilapidations existing at the time of Mr. Maberley's report, and partly in respect of dilapidations which occurred since that date. The sequestrator believed and was advised that all the work done was necessary for the due maintenance of the glebe buildings. The defendant on various occasions protested against the making of this expenditure. Mr. Waller from time to time visited the glebe buildings and made recommendations to the sequestrator as to the works to be done, but the bishop did not at any time direct the surveyor to inspect under the Ecclesiastical Dilapidations Act, 1871, except when he directed Mr. Maberley to inspect as aforesaid, and no report or estimate other than that of Mr. Maberley was made under the Ecclesiastical Dilapidations Act, 1871, in respect of the condition of the glebe buildings or the works to be executed thereon.

Jeune, for the defendant, moved upon the report of the master to disallow the items in the account of the sequestrator for the repairs in excess of 140*l.* as not incurred in accordance with the provisions of the Ecclesiastical Dilapidations Act, 1871. Since the passing of the Ecclesiastical Dilapidations Act, 1871, where the bishop has put in force the provisions of the Act, a seques-

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trator is not entitled to apply the proceeds of the benefice to any repairs other than those authorized by the report under that Act. The Act provides new machinery for the purpose of preventing the disputes and expense previously occasioned by questions of dilapidations, and, when there is a report of a diocesan surveyor under s. 8, repairs can only be done in conformity with such report. The provisions of ss. 12, 13, 14, 16, 19, 20, 21, and 45 expressly refer to the case of a benefice under sequestration. It is quite inconsistent with the scope of the Act and the terms of these sections that, when there has been a report, the sequestrator should have power to disregard the provisions of the Act and to expend such sums on repairs as he may think expedient without regard to the report of the surveyor. If he could do so, the Act would be nugatory so far as it applies to cases of sequestration. He cited *Jones* v. *Dangerfield.* (1)

Ram, (*Charles, Q.C.,* with him), for the sequestrator, shewed cause. It is quite clear that a sequestrator prior to the Act of 1871 would have had power to incur this expenditure and defray it out of the funds of the benefice, for he was bound to keep the buildings in repair: *Hubbard* v. *Beckford.* (2) The question is whether there is anything in the Act to alter his position in this respect and to oblige him to proceed in respect of dilapidations under that Act only. The Act was intended to provide for the relief of spiritual persons and for the settlement of disputes between outgoing incumbents or the representatives of deceased incumbents and incoming incumbents; and, though no doubt the machinery given is applicable to the case of a sequestrator, it is contended that it gives in his case only an alternative procedure and there is nothing to take away his power of proceeding as before, or his duty to keep the buildings in repair irrespective of the Act. Where it is intended that the Act shall be applicable without alternative it is so expressed: see s. 53. The 72nd section saves any authority or power which before the passing of the Act any bishop or archdeacon or other ordinary possessed in respect of requiring the repairs of any ecclesiastical buildings to be executed. It is contended that the power of the sequestrator as directed by the bishop to perform the functions of a seques-

(1) 1 Ch. D. 438. (2) 1 Consist. Rep. 307.

trator, which include the repair of the buildings, is preserved by this section.

[LORD COLERIDGE, C.J.:—It hardly seems correct to speak of the power of a sequestrator to do repairs in the sense which this argument requires. The sequestrator is appointed by the bishop to levy the civil debt from the proceeds of the benefice, but the writ which appoints him says nothing about repairs. The correct view seems to be that it is a duty cast on him by the law to provide for the repair of the buildings while the sequestration continues, not a power given or requirement made by the bishop.]

Jeune was not called on to reply.

LORD COLERIDGE, C.J. I have listened with attention to the argument on behalf of the sequestrator; but it seems to me that the conclusion to which that argument would lead us is so contrary to the whole tenor of the very useful Act passed in 1871 with regard to ecclesiastical dilapidations, that I cannot look upon it for a moment as tenable. It cannot be denied that, where there is a sequestration of a benefice for the purpose of levying a debt, before any of the proceeds of the benefice can be applied to the debt, certain matters must be provided for, such as the performance of Divine worship and the sustentation of the buildings belonging to the benefice; and therefore prior to the Act of 1871 the sequestrator, who had to levy a certain sum out of the profits of the benefice, had imposed upon him by law the duty of previously making provision for the sustentation of the buildings, which duty could have been enforced either in a court of law, or in the ecclesiastical courts, according to the processes peculiar to those courts respectively.

In 1871, however, the law with regard to ecclesiastical dilapidations was, to use the expression used by the Master of the Rolls in *Jones* v. *Dangerfield* (1), remodelled, and an elaborate machinery was created, whereby the endless disputes and troublesome and expensive litigations between incoming incumbents and outgoing incumbents, or the representatives of deceased incumbents, might be prevented, and a convenient mode provided for defining the liability of incumbents or their estates in respect of dilapidations.

(1) 1 Ch. D. 438.

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The contention of the sequestrator is that he, being placed by the bishop in the position of a sequestrator to levy the amount of a debt out of the profits of the benefice under a writ of sequestration, which says nothing whatever about making provision for repairs or other liabilities of the incumbency, is emancipated from all the careful and elaborate provisions of the Act with regard to dilapidations. I cannot see why this should be so. There are provisions in the Act which appear to me expressly to provide that in the case of sequestrations, where the provisions of the Act are put in force, the sequestrator shall be bound by them. There are provisions in ss. 12 to 14 which expressly provide for inspection and report as to dilapidations by the diocesan surveyor as well in cases where the benefice is under sequestration as in other cases; and the 16th section enables the incumbent or the sequestrator to take objections to the report, and provides that, when there has been such a report, such report, if there are no objections, shall be final, and, if there are objections, such report as modified by the bishop's decision shall be final. In this case there was a report made under the Act that a certain sum was sufficient. The sequestrator was afterwards of opinion that a larger expenditure for dilapidations was necessary, and thereupon, without any report, without giving notice to any one, or following any of the provisions of the Act, he accordingly proceeded to make such expenditure, and contends that he was entitled to do so notwithstanding the Act and the report of the surveyor made under it. I think this contention quite untenable. It seems to me that, if it were correct, the salutary protection, intended to be given by the Act to a class of men often in needy circumstances without any fault of their own, would not apply to cases where it is most needed. If the terms of the Act compelled us to adopt the construction contended for by the sequestrator, of course we should be bound to do so, but unless compelled to do so by the clearest language I, for one, should shrink from coming to this conclusion.

The only words of the Act on which counsel could rely as favouring the construction contended for by the sequestrator were those of the 72nd section. It seems to me that that section is merely a general saving clause inserted for the purpose of preserving any power possessed by the bishop or archdeacon, or other

ordinary, of requiring repairs of any ecclesiastical buildings. Here there was no such requisition by any ecclesiastical authority. I am clear that the 72nd section did not mean that whenever the bishop, archdeacon, or other ordinary thinks fit, all the provisions of the Act are to be dispensed with. For these reasons I think these items in the sequestrator's accounts must be disallowed.

MATHEW, J. I am of the same opinion. I do not think that the legislature can have intended, by the 72nd section, to give to the authorities there mentioned a power of dispensing with the Act of Parliament. The counsel for the sequestrator failed, as it appears to me, to shew any reason why any distinction for the purposes of the Act should be drawn between the case of a benefice under sequestration and other cases in which the question of dilapidations arises. It seems to me clear that the 72nd section was introduced merely for the purpose of saving the ecclesiastical powers of the authorities therein mentioned, and not for the purpose of introducing a qualification of the Act of Parliament, which in the case of livings under sequestration would in fact render it a nullity.

Rule absolute.

Solicitors for defendant: *Clarke, Rawlins, & Co.*
Solicitors for sequestrator: *Burton, Yeates, Hart, & Burton.*

E. L.

1885
June 10.

[IN THE COURT OF APPEAL.]

PAGE *v.* MORGAN.

Contract—Sale of Goods—Statute of Frauds, s. 17*—Acceptance—Act recognising the Contract.*

It is not necessary in order to satisfy the requirements of the 17th section of the Statute of Frauds that there should be an absolute acceptance of goods: there is sufficient evidence of an acceptance of goods within the section where upon delivery of the goods the purchaser has received them and done any act in relation thereto recognising the existence of a contract for the purchase of them by him, though he subsequently refuses the goods. So, where there was a sale of wheat by sample, and the purchaser, having received a number of sacks of wheat delivered under the contract into his premises, opened the sacks and examined their contents to see if they were equal to sample, but immediately after so doing gave notice to the seller that he refused the wheat as not being equal to sample:—

Held, that there was evidence of an acceptance.

Kibble v. *Gough* (38 L. T. (N.S.) 204) followed.

Rickard v. *Moore* (38 L. T. (N.S.) 841) discussed.

Appeal from the judgment of the Queen's Bench Division refusing an application for a new trial, or to enter judgment for the defendant.

The action was for the price of wheat, or in the alternative for damages for non-acceptance of the wheat.

The statement of defence denied the contract of purchase, alleged that the wheat was sold by sample, and the bulk was not equal to the sample, and set up non-compliance with the Statute of Frauds.

The case was tried before Bulwer, Q.C., sitting as commissioner at the Chelmsford Summer Assizes, 1884, when the facts were as follows:—

The defendant, a miller, bought of the plaintiff by oral contract through the plaintiff's agent eighty-eight quarters of wheat. The sale was by sample. The wheat was shipped by the plaintiff's agent on a barge for carriage to the defendant's mill, which was upon a navigable canal. The barge arrived at the mill on the evening of Tuesday the 25th of March, and at 8 o'clock on the morning of the 26th some of the sacks containing the wheat were, by direction of the defendant's foreman, hoisted up out of the

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barge on to the mill and examined by him. After twenty-four sacks had been hoisted up and examined the foreman sent for the defendant, who came to the mill and inspected the contents of the sacks already delivered, and ordered some more to be sent up for examination, and after having examined thirty-eight sacks in all, he at 9 o'clock told the bargeman to send up no more, as the wheat, he said, was not equal to sample. The defendant then on the same day went off to see the plaintiff's agent at a neighbouring market town, and told him that the wheat was not equal to sample, and that he should not take it. Some days afterwards, the exact interval, however, was not stated, the wheat taken into the mill was returned by defendant's order to the barge, which remained at the defendant's mill with the wheat in it, the plaintiff refusing to take the wheat away, for seven weeks and until after action was brought, when the wheat was sold by the order of a judge at chambers, and the proceeds paid into court to abide the event of the action.

The learned commissioner directed the jury, on the authority of *Morton* v. *Tibbett* (1) and *Kibble* v. *Gough* (2), that there was evidence of an acceptance by the defendant sufficient to constitute a contract within the 17th section of the Statute of Frauds, although the defendant was not precluded from rejecting the wheat if not equal to sample. The jury found that the wheat was equal to sample, and that the defendant had accepted it within the meaning of the 17th section of the Statute of Frauds, and accordingly gave a verdict for the plaintiff.

A rule for a new trial, or to enter judgment for the defendant, was moved for on the ground that there was no evidence for the jury of an acceptance of the wheat by the defendant to satisfy the statute, but the Queen's Bench Division (Lord Coleridge, C.J., and Cave J.) refused the application.

Morten (*Murphy, Q.C.*, with him), for the defendant. It is clear from the authorities that there must be something more than a mere receipt of the goods to constitute an acceptance within the statute, for the statute speaks both of "acceptance" and "receipt." *Morton* v. *Tibbett* (1) decides that the acceptance to satisfy the

(1) 15 Q. B. 428. (2) 38 L. T. (N.S.) 204.

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statute need not be such as to preclude subsequent rejection of the goods if not according to contract, and that acceptance may precede receipt, but in that case there was clear evidence of an acceptance besides the mere fact of receipt, for the purchaser had resold the goods. Where the purchaser on receipt of the goods keeps them no longer and does nothing more than is necessary for their examination, and upon such examination immediately rejects them, as was the case here, there is no evidence of an acceptance to satisfy the statute. The case of *Kibble* v. *Gough* (1) is distinguishable, for there successive deliveries were received, although some demur was made to the quality of the goods. In *Rickard* v. *Moore* (2), Lord (then Lord Justice) Bramwell, explains the effect of *Kibble* v. *Gough* (1), and as explained by him it appears to be no authority for the proposition that a mere receipt and examination of the goods, followed by rejection, is evidence of acceptance. Under no reasonable construction of the word "acceptance" can there be said to be an acceptance if immediately upon receipt and examination the goods are rejected.

Philbrick, Q.C., and *R. Vaughan Williams*, for the plaintiff, were not called upon to argue.

BRETT, M.R. It seems to me that the case of *Kibble* v. *Gough* (1) lays down the governing principle with regard to the question whether there is evidence of an acceptance to satisfy the 17th section of the Statute of Frauds. It was there pointed out that there must be under the statute both an acceptance and actual receipt, but such acceptance need not be an absolute acceptance; all that is necessary is an acceptance which could not have been made except upon admission that there was a contract, and that the goods were sent to fulfil that contract. Cotton, L.J., in giving judgment in that case, said: "All that is wanted is a receipt and such an acceptance of the goods as shews that it has regard to the contract, but the contract may yet be left open to objection: so that it would not preclude a man from exercising such a power of rejection. I think that in this case enough had been done to satisfy the statute." Now what had been done in that case? The goods had been taken into the

(1) 38 L. T. (N.S.) 204. (2) 38 L. T. (N.S.) 841.

defendant's warehouse and kept for some time, though not so long as to make it unreasonable that the defendant should exercise his right of rejection if the goods had not been according to contract, and the defendant had inspected the goods. They therefore had been delivered and actual possession of them had been taken, and they had been dealt with by the defendant for the purposes of the contract. It was held that under those circumstances what had been done in respect to the goods by the defendant must be considered as having been done with regard to a contract for the purchase of the goods, and as amounting to a recognition of the existence of such contract, and that therefore, though the defendant might still have a right to reject the goods if not equal to sample, there was evidence on which the jury might find that the defendant had accepted the goods within the meaning of the statute. That being the law as laid down by that decision, what was the evidence on the question of acceptance in the present case? The wheat was sent to the defendant's mill in a barge, which was brought under the mill in the evening. The next morning a considerable quantity of wheat was taken up by the defendant's servants into the defendant's mill and remained there some time more or less until the defendant had opened the sacks and examined their contents to see if they corresponded with the sample. How could the defendant have these sacks taken into his mill and there opened and examined without a recognition of the existence of a contract entitling him so to deal with them? How could any reasonable men come to any other conclusion from his dealing with them than that he had made a contract of purchase with regard to them, and that the goods were delivered to and received by him under such contract, and examined by him to see if they were according to the contract? It seems to me clear that under these circumstances there was evidence for the jury of an acceptance within the meaning of the statute. I can conceive of many cases in which what is done with regard to the delivery and receipt of the goods may not afford evidence of an acceptance. Suppose that goods being taken into the defendant's warehouse by the defendant's servants, directly he sees them, instead of examining them, he orders them to be turned out or refuses to have anything to do

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with them. There would there be an actual delivery, but there would be no acceptance of the goods, for it would be quite consistent with what was done that he entirely repudiated any contract for the purchase of the same. I rely for the purposes of my judgment in the present case on the fact that the defendant examined the goods to see if they agreed with the sample. I do not see how it is possible to come to any other conclusion with regard to that fact than that it was a dealing with the goods involving an admission that there was a contract. It appears to me that, having regard to the case of *Kibble* v. *Gough* (1), which is an authority binding on us, there was clearly evidence in this case for the jury of an acceptance, and that upon such evidence there was only one conclusion to which they reasonably could come. The counsel for the defendant placed reliance on the case of *Rickard* v. *Moore*. (2) It is alleged that in that case Lord Bramwell doubted the correctness of what he had said in the previous case of *Kibble* v. *Gough*. (1) However that may be, it is quite clear that that case cannot overrule *Kibble* v. *Gough*. (1) For these reasons I am of opinion that this appeal must be dismissed.

BAGGALLAY, L.J. I am of the same opinion. It has been decided in the cases of *Morton* v. *Tibbett* (3) and *Kibble* v. *Gough* (1) that there may be an acceptance within the statute though it is not such an acceptance as to preclude the defendant from objecting subsequently that the goods are not according to the contract, and rejecting them on that ground. Different opinions have been expressed as to the true grounds on which *Morton* v. *Tibbett* (3) was based, but it seems to me that the case of *Kibble* v. *Gough* (1) has made the effect of the former decision clear. Reliance was placed by the defendant's counsel on the case of *Rickard* v. *Moore*. (2) But when that case comes to be examined there are various points of difference which are adverted to in the judgments, and there is also the most important distinction adopted by Thesiger, L.J., in giving judgment, viz., that, whereas in *Kibble* v. *Gough* (1) the jury found that the goods were equal to sample,

(1) 38 L. T. (N.S.) 204. (2) 38 L. T. (N.S.) 841.
(3) 15 Q. B. 428.

in *Rickard* v. *Moore* (1) the jury found that they were not equal to sample. The only question we have to consider is whether there is evidence of an acceptance in this case within the principle laid down in the cases of *Morton* v. *Tibbett* (2) and *Kibble* v. *Gough*. (3) It seems to me clear that there was such evidence.

BOWEN, L.J. This case appears to me to be governed by the decision in *Kibble* v. *Gough*. (3) That decision would be binding upon me whether I agreed with it or not, but it seems to me that it is based on the soundest sense. The statute says that the contract shall not be good unless, among other alternative requisites, there has been an acceptance and actual receipt of some part of the goods. Having regard to the mischiefs at which the statute was aimed, it would appear a natural conclusion that the acceptance contemplated by the statute was such a dealing with the goods as amounts to a recognition of the contract. That, accordingly, was the view taken by this Court in the case of *Kibble* v. *Gough*. (3) In *Rickard* v. *Moore* (1) there was the distinction that has been pointed out by my Brother Baggallay. In *Kibble* v. *Gough* (3) the goods were found to be equal to sample, and it therefore became necessary to decide in that case whether there was an acceptance within the 17th section; in *Rickard* v. *Moore* (1) the goods were found not to be equal to sample, so it was only necessary to decide whether they were rightly rejected. I do not think that Lord Bramwell, by his remarks on what had thus become a by point, can have intended to overrule the previous decision of this Court. In any case we are bound by the decision in *Kibble* v. *Gough*. (3)

Appeal dismissed.

Solicitors for plaintiff: *Clapham & Fitch.*
Solicitors for defendant: *Duffield & Bruty.*

(1) 38 L. T. (N.S.) 841. (2) 15 Q. B. 428.
(3) 38 L. T. (N.S.) 204.

E. L.

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June 10.

[IN THE COURT OF APPEAL.]

TURNBULL *v.* FORMAN.

Husband and Wife—Married Woman—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 4—*Construction not retrospective—Contract made by Married Woman before the Act not binding on after-acquired Separate Property.*

Sub-s. 4 of s. 1 of the Married Women's Property Act, 1882, is not retrospective, and, therefore, in an action on a contract made by a married woman before the passing of that Act, judgment cannot be ordered in such terms as to be available against separate property to which the defendant became entitled after the date of the contract.

APPEAL pursuant to special leave given by Mathew, J., to appeal directly to the Court of Appeal against an order made by him at chambers, affirming an order of Master Butler. (1)

The facts were as follows:—

The defendant, a married woman, was sued upon a promissory note made by her before the passing of the Married Women's Property Act, 1882, she being a married woman at the time of making such note. An application being made for judgment against her under Order XIV., the master made an order which, so far as material, was in the following terms: "It is ordered that the plaintiff be at liberty to sign final judgment in this action for the amount indorsed on the writ, with interest, if any, and costs to be taxed, but that the execution thereon be limited to the separate estate of the defendant not subject to any restraint against anticipation (unless by reason of s. 19 of the Married Women's Property Act, 1882, the property shall be liable to such execution notwithstanding such restraint), and it is further ordered and declared that any separate estate of the above-named defendant not subject to any restraint against anticipation (unless by reason of s. 19 of the Married Women's Property Act, 1882, the property shall be liable to such execution notwithstanding such restraint) to which the said defendant is at this present date

(1) The Court of Appeal said that the case must not be taken as a precedent for bringing appeals from Chambers direct to the Court of Appeal, passing by the Divisional Court.

entitled, is chargeable with the payment to the plaintiff of the amount indorsed on the writ with interest, if any, and costs; and it is further ordered that an inquiry be had before one of the masters whether the said defendant has now any and what separate estate, and of what it consists, and from what it has arisen, and in whom the same is vested, and whether the same is in any and what manner and to any and what extent subject to any restraint against anticipation, or is charged or liable to the payment of any and what debts or charges."

On appeal to Mathew, J., he affirmed the master's order.

Cozens-Hardy, Q.C., and *Channell*, for the defendant, in support of the appeal. The order for judgment cannot be supported, because it would render subject to execution any separate property of the defendant to which she became entitled after the making of the contract. It is clear that previously to the passing of the Married Women's Property Act, 1882, the contract of a married woman only bound separate property to which she was entitled, free from restraint on anticipation, at the date of the contract, and continued to be so entitled at the time of judgment: *Pike* v. *Fitzgibbon* (1). Sub-s. 3 and 4 of s. 1 of the Act provide that "every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property unless the contrary be shewn," and "every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." It is submitted that according to the well-known rule of construction sub-s. 4 ought not to be construed retrospectively, the language being ambiguous and capable of either construction. There have been conflicting decisions on this point: *Bursill* v. *Tanner* (2), and *Conolan* v. *Leyland* (3); but it may be doubted whether the point was not rather assumed than decided in *Bursill* v. *Tanner*. (2) According to the doctrine that prevailed with regard to the contracts of married women before the passing of

(1) 17 Ch. D. 454. (2) 13 Q. B. D. 691.
(3) 27 Ch. D. 632.

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the Act, the contract was treated as intended to bind only the married woman's existing separate property. And, therefore, to give the 4th sub-section a retrospective construction would be really to alter the meaning and effect of the promissory note from that which it had when signed. The order should be varied by limiting its effect to separate property to which the defendant was entitled at the time when she made the contract, according to the form in *Pike* v. *Fitzgibbon*. (1)

[They also cited *In re March*. (2)]

Wallace, for the plaintiff, contrà. The words of the 4th sub-section clearly include all contracts made by a married woman whether before or after the passing of the Act. In the case of *Weldon* v. *Winslow* (3) it was held that sub-s. 2 of s. 1 of the Act was retrospective, and it is contended that similar considerations apply to the 4th sub-section as were there applied to the 2nd.

Cozens-Hardy, Q.C., was not called upon to reply.

BRETT, M.R. There is an old and well-known rule with regard to the construction of enactments affecting rights which, as it seems to me, must be applied to the construction of the enactment now in question. That rule was applied by this Court in *In re March* (2) to the same statute. It is that, unless the language used is clear to the contrary, an enactment affecting rights must be construed prospectively only and not retrospectively so as to affect rights acquired before the Act passed. Sub-s. 4 of s. 1 of the Married Women's Property Act, 1882, clearly affects rights. It gives to the party with whom a contract is made by a married woman a greater right than he would have had before the Act. The case of *Pike* v. *Fitzgibbon* (1) shews what rights were given by such a contract as against the married woman's property before the Act, and the sub-section clearly extends the rights given by such a contract. The rule, therefore, applies that, unless the words are clear, the enactment is not to be construed retrospectively. It was argued that the decision of this Court in *Weldon* v. *Winslow* (3) is contrary to the view we are now taking, it being there held that the 2nd sub-section of the 1st section was to be

(1) 17 Ch. D. 454. (2) 27 Ch. D. 166.
(3) 13 Q. B. D. 784.

construed retrospectively. But the ground of the decision in that case was that no right was affected or altered by the construction there applied to the 2nd sub-section. It was there pointed out that, the action being in tort for personal injuries, and the wife being the meritorious cause of action, the plaintiff could have sued before the Act passed precisely as she did after the Act, subject only to the liability to a plea in abatement, upon which she would have been forced to join the husband for conformity only. It was held, therefore, that there was no question of alteration of a right, but only one of procedure, the effect of sub-s. 2 being only to prevent the defendant from objecting that the husband was not joined for conformity. When an Act deals with procedure it affects all subsequent procedure, but it cannot rightly be said therefore to be retrospective, because it is only the subsequent procedure that it affects; it cannot be said to affect any right which existed before the Act. The case of *Weldon* v. *Winslow* (1) is, therefore, altogether distinguishable from the present, and is no authority with regard to the construction of a section that affects rights. For these reasons it appears to me that the judgment of Chitty, J., in *Conolan* v. *Leyland* (2) was correct, and that, if the judgment in *Bursill* v. *Tanner* (3) was to the contrary, it cannot be supported. The order must be therefore modified so as to be in conformity with the law as it existed previously to the passing of the Married Women's Property Act, 1883.

BAGGALLAY, L.J. I agree. The substantial question we have to decide is whether the 4th sub-section of the 1st section of the Married Women's Property Act, 1882, is retrospective. There appear to have been conflicting decisions on this question in the cases of *Conolan* v. *Leyland* (2) and *Bursill* v. *Tanner*. (3) In *Bursill* v. *Tanner* (3) the Divisional Court seem to have proceeded on the assumption that the sub-section was retrospective, but in *Conolan* v. *Leyland* (2) Chitty, J., took a different view, and held that the 4th sub-section was not retrospective. For the reasons given by the Master of the Rolls I agree that that construction

(1) 13 Q. B. D. 784. (2) 27 Ch. D. 632.
(3) 13 Q. B. D. 691.

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was correct. It is not necessary for the purposes of the present case to go into the matter, but I desire to reserve for a future occasion the consideration of the question how far the judgment in *Bursill* v. *Tanner* (1) is correct with regard to the form of order in cases to which the sub-section applies, as to which I entertain considerable doubt. A modified form of order seems to have since come into use, which was used in the present case, and with regard to the question whether that is entirely free from objection I also reserve my opinion.

BOWEN, L.J. I am of the same opinion, and I should add nothing but for the fact that we have to decide between conflicting decisions in the Courts below. I think this case must be decided by the application to sub-s. 4 of a well-known rule of construction. Where the legislature mean to take away or lessen rights acquired previously to the passing of an enactment, it is reasonable to suppose that they would use clear language for the purpose of doing so, or, to put the same thing in a somewhat different form, if the words are not unequivocally clear to the contrary, a provision must be construed as not intended to take away or lessen existing rights. A converse rule is that, where the legislature is dealing with matters of procedure as distinguished from substantive rights, the same presumption does not apply. It is not unreasonable to suppose that, in regard to mere matters of procedure, the legislature does intend to alter the procedure even where past transactions come in question; because no person who sues or is sued on a cause of action which existed before the enactment as to procedure has a vested right to have proceedings regulated by a particular method of procedure which the legislature has thought imperfect, and therefore has altered; and it may, therefore, well be supposed that the legislature intends to apply the new and more perfect procedure universally. Bringing these rules to bear on the construction of the 4th sub-section of the 1st section of the Married Women's Property Act, 1882, it appears to me that the words are ambiguous; they admit of both constructions, viz., that they apply to all contracts, whether made before or after the Act, or that they apply only to contracts made after the passing of the Act. Then

(1) 13 Q. B. D. 691.

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it is clear that the enactment affects rights. Therefore the first of the two rules which I have mentioned applies, and the enactment ought not to be construed retrospectively. This decision is in conformity with the view taken by this Court in *In re March* (1) and is not inconsistent with the construction applied to sub-s. 2 in *Weldon* v. *Winslow*. (2)

For these reasons the appeal must be allowed and the order for judgment varied accordingly.

Appeal allowed and order for judgment varied accordingly.

Solicitors for plaintiff: *Caister & Shearman.*
Solicitors for defendant: *Thomas White & Sons.*

E. L.

May, 15, 22.

[IN THE COURT OF APPEAL.]

LINTON *v.* LINTON.

Bankruptcy—Proof—"Debt or Liability"—Order of Divorce Court for Payment of monthly or weekly Alimony—29 & 30 Vict. c. 32, s. 1—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 37—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.

Future weekly or monthly payments of alimony, payable by a husband by virtue of an order of the Divorce Court made under s. 1 of the Act 29 & 30 Vict. c. 32, are not capable of valuation, and are not a "debt or liability" within the meaning of s. 37 of the Bankruptcy Act, 1883. They cannot, therefore, be proved in the bankruptcy of the husband, and he is, notwithstanding his bankruptcy, liable to continue the payments.

Arrears of payments of alimony under such an order constitute a debt enforceable under s. 5 of the Debtors Act, 1869.

Decision of Cave, J., affirmed.

APPEAL from an order of Cave, J., on a judgment summons for the payment of certain instalments by the defendant.

Helen Linton, the wife of J. P. Linton, petitioned the Probate Division for a judicial separation from her husband. On the hearing of the petition on the 14th of February, 1883, terms of settlement were signed by the husband and wife, which contained

(1) 27 Ch. D. 166. (2) 13 Q. B. D. 784.

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provisions as to the custody of the children of the marriage, and also the following provisions: "Judicial separation by consent. Permanent alimony at 1*l.* 15*s.* per week, payable monthly. So long as this order is complied with, no further application to be made. Mr. Linton to pay 100*l.* in discharge of costs, 50*l.* within six months, and the other 50*l.* within twelve months from this date." These terms were embodied in a decree or order of the Court, which decreed a judicial separation between the wife and the husband, and made provisions as to the custody of the children of the marriage, and "ordered, with the consent of both parties, that the respondent do pay or cause to be paid to the petitioner permanent alimony at the rate of 1*l.* 15*s.* per week, payable monthly, the petitioner undertaking that, so long as this order is complied with, she will make no further application as to alimony."

The husband had no property, but he was in the receipt of a salary of more than 300*l.* a year as a clerk to a firm of solicitors.

On the 21st of November, 1883, on the application of Mrs. Linton to the Queen's Bench Division, the terms of settlement were made an order of that Court.

For some time the husband paid the alimony in accordance with the agreement, but ultimately he allowed the payments to fall into arrear. On the 16th of May, 1884, he was adjudicated a bankrupt on his own petition, and after that he discontinued the payment of the alimony. The wife proved in the bankruptcy for the arrears of alimony due at the date of the adjudication and for the 100*l.* costs. On the 18th of February, 1885, the arrears of alimony due to the wife amounted to 70*l.* On that day she issued a judgment summons in the Court of Bankruptcy, calling on her husband to appear before the Court to be examined on oath touching the means he might have had since the date of the order of the Queen's Bench Division to pay the alimony. The husband appeared before the Registrar, and objected to the jurisdiction of the Court, on the ground that the adjudication absolved him from all liability to pay the alimony, and that the arrears due at the date of the adjudication, and also the payments accruing due subsequently, were provable in the bankruptcy. The hearing of the summons was adjourned to Cave, J., and was

heard by him in chambers on the 14th, 21st and 25th of March and the 1st of April, 1885.

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Osbaldeston (solicitor) for the wife.
F. Cooper Willis, for the husband.

CAVE, J. In my opinion the order for alimony continues in force notwithstanding the bankruptcy. The question appears to have been considered in *Prescott* v. *Prescott* (1), and, although that case was decided under the Bankruptcy Act of 1849, which was far less wide in its terms than the present Bankruptcy Act with reference to the liabilities which could be proved in bankruptcy, yet it seems to me that the enlargement of the terms, that is, the provision that all kinds of contingencies can be taken into account, does not affect this particular kind of alimony. Alimony of this kind is not property in the ordinary sense. A woman is not at liberty to alienate it. The amount of it may be altered from time to time, according to the circumstances of the husband. If he has acquired large property, his wife may have the advantage of it by obtaining an order for increased alimony. On the other hand, if his means fall away, she has to suffer with him, and she would lose the alimony which had originally been allotted to her, if her husband became unfortunate and had no longer the means of paying it. In the present case the order was for payment of so much a week, because the husband's income was derived from his labours, and not from any actual realized property.

I should be altogether defeating the Act if, in a case of this kind, I were to allow the husband to get rid of such an order by bankruptcy proceedings. If that which has taken place has produced a change in his circumstances, so that what was previously a fair amount of alimony is not a fair amount now, he can apply to the judge of the Divorce Court for an alteration in the amount of the alimony. That he has not done, and, having regard to *Prescott* v. *Prescott* (1), and to the fact that Lindley, L.J., in *In re Robinson* (2) recognises *Prescott* v. *Prescott* (1) as being still in force, and speaks of a claim to alimony as not provable in the husband's bankruptcy, I think I am bound to make an

(1) 20 L. T. (N.S.) 331.
(2) 27 Ch. D. 160.

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order on this summons. I do not think I ought to make an order for committal for the non-payment of the whole 70*l.* at once, for the arrears have been allowed to accumulate, and that is probably a larger sum than it is in the bankrupt's power at the present moment to discharge. But I will make an order that he be committed if he does not pay 12*l.* within a month, and I will reserve liberty to the applicant to apply again without taking out a fresh summons. I will further order that the bankrupt do keep up the payment of 12*l.* per month until the arrears are cleared off, and when that is done he may revert to the payment of 1*l.* 15*s.* a week; 12*l.* a month is about 5*l.* a month more than the amount of the monthly payments of alimony, and in a little over a year the arrears will be cleared off.

By the order as drawn up the judge ordered and adjudged that the liability of the husband under the order of the Queen's Bench Division was not affected by the bankruptcy to the extent of the alimony accrued due since the adjudication, and it was ordered that the husband should pay to the wife the sum of 12*l.* on the 1st of May, 1885, together with the costs of the order, and in default of payment that a committal order should issue against him. And it was further ordered that he should keep up the payment of 12*l.* a month until the arrears were cleared off, and that then he might go back again to the sum of 1*l.* 15*s.* per week.

From this order the husband appealed.

It was agreed to treat the case as if the order appealed from had been made simply to enforce an order of the Divorce Division for alimony.

May 15. *Cooper Willis, Q.C.*, and *F. Cooper Willis*, for the husband. The future payments of the alimony constitute a "debt or liability" of the husband within the meaning of s. 37 of the Bankruptcy Act, 1883. They are capable of being valued, and the value is provable in the bankruptcy. The wife is a creditor in respect of a provable debt and she has no other remedy: s. 9. The intention of s. 37 is that every liability of a bankrupt, other than damages for a tort, should be provable in

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the bankruptcy. An action could have been brought on the agreement: *Wentworth* v. *Bullen*. (1)

The intention of s. 37 is to free a bankrupt from all his liabilities. The words are the same as those of s. 31 of the Bankruptcy Act, 1869, under which it was held that an annuity payable by a husband to his wife under the provisions of a separation deed was provable in his bankruptcy: *Ex parte Neal*. (2) There is no distinction between an order to pay weekly alimony and an order to pay any other sum by instalments. If the future payments of alimony do not constitute a debt or liability under s. 37, they were not a debt within the meaning of s. 5 of the Debtors Act, and the remedy provided by that section is not applicable.

Yate Lee, for the wife. It would be a strange thing if such an order, which is intended to provide for the maintenance of a wife whose husband is earning an income sufficient to enable him to support her, could be evaded by his own institution of bankruptcy proceedings. He has not asked the Divorce Court to suspend or set aside the order. Sect. 5 of the Debtors Act includes an order for the payment of that which is not a debt in the strict sense of the word. Alimony is not property; it cannot be assigned by the wife: *In re Robinson* (3). The Divorce Court can vary the amount of it according to the means of the husband. It is not the subject of proof in the bankruptcy of the husband: *Prescott* v. *Prescott*. (4) The payment of arrears of alimony cannot be enforced in an action: *Bailey* v. *Bailey*. (5)

Cooper Willis, Q.C., in reply. The Act 29 & 30 Vict. c. 32, does not apply, because there has been no decree for a dissolution of marriage. The order is for permanent alimony, not for a variable payment. There is no distinction in bankruptcy between legal and equitable debts. *Prescott* v. *Prescott* (4) was decided under the Bankruptcy Act of 1849.

May 22. BRETT, M.R. Under the provisions of s. 1 of the Act 29 & 30 Vict. c. 32, an order was made by the Divorce Court that the bankrupt should pay a weekly alimony to his wife. It

(1) 9 B. & C. 840.
(2) 14 Ch. D. 579.
(3) 27 Ch. D. 160.
(4) 20 L. T. (N.S.) 331.
(5) 13 Q. B. D. 855.

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seems that from the moment the order was made he determined to disobey it, and, though he had ample means, he allowed the payments to fall into arrear. Then he was made a bankrupt on his own petition, and, having been adjudged a bankrupt, he says, not only that the arrears of alimony due at the commencement of the bankruptcy must be proved for in the bankruptcy, but also that the future payments must be valued and proved for, and that he is no longer liable to make them. A summons is taken out under the Debtors Act for an order of committal against him if he does not make the payments, and the question raised is whether by his self-imposed bankruptcy he is able to get rid of the order for payment of alimony. Anything more disgraceful in a moral point of view than his attempt to do so cannot be imagined; the question is whether it is successful. The order for alimony was made under the Act which I have mentioned. Let us see what the meaning of the Act is. The preamble contains a recital of the power of the Divorce Court under the Act 20 & 21 Vict. c. 85, s. 32, and that "it sometimes happens that a decree for a dissolution of marriage is obtained against a husband who has no property on which the payment of any such gross or annual sum can be secured, but nevertheless he would be able to make a monthly or weekly payment to the wife during their joint lives." The statute is aimed at the case of a husband who has no property out of which any payment of a lump sum can be made to his wife, but who is earning a livelihood, and who has ample means to make monthly or weekly payments to her. And the Act provides by s. 1 that "in every such case it shall be lawful for the Court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the Court may think reasonable; provided always, that, if the husband shall afterwards from any cause become unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order, wholly or in part, as to the Court may seem fit." Under this Act the Court is not empowered to enforce the payment of a lump sum by the husband, but only the making of monthly or weekly

payments to the wife, and there is power to diminish the amount of the payments in case the husband's circumstances alter, and he becomes less able to pay, and, I suppose, also to compel him to pay more in case his circumstances improve. The power is given in consideration of the husband's ability to pay irrespectively of his having any realized property, and it is a power to make him pay out of his earnings by means of his own personal exertions. That shews what this kind of alimony was intended to be by the legislature. A man's personal earnings after his bankruptcy do not go to his creditors; he keeps them himself notwithstanding his bankruptcy. He is as well able to pay alimony of this kind after his bankruptcy as before. That which would go to his wife would take nothing away from his creditors; if he does not pay it to her, he will keep it himself, and he will do this by means of a self-imposed bankruptcy. It would be a strange thing if, through an accidental oversight of the legislature, this could be done. Does, then, the bankruptcy law enable the bankrupt to do this? The only ground for saying so is that the future payments can be proved in the bankruptcy. It is said that they can be valued. How can they be valued? They are not payments of a life annuity; they might be stopped at any moment if the husband and wife returned to cohabitation. On the two grounds, that it was not intended by the Divorce Act that such an order should be made a nullity by the bankruptcy of the husband, and that the future payments cannot be valued under s. 37 of the Bankruptcy Act, I think that the order of Mr. Justice Cave was right.

BAGGALLAY, L.J. I am of the same opinion. The substantial question is, whether the obligation imposed upon a husband by an order of the Divorce Court for the payment of alimony to his wife is, within the meaning of s. 37 of the Bankruptcy Act, a debt or liability provable in his bankruptcy? I entertain a very strong opinion that it is not, and it was so held by the Judge Ordinary in *Prescott* v. *Prescott* (1) with regard to s. 175 of the Bankruptcy Act of 1849. An order for the payment of alimony may be varied from time to time according to the means of the husband; there is, therefore, no means of putting a value upon

(1) 20 L. T. (N.S.) 331.

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the future payments for the purpose of a proof in bankruptcy. Of course, the case is very different with regard to the payments which became due before the bankruptcy and were not paid. But the future payments might cease the next day, or the amount of them might be varied from time to time. They cannot be valued, and they are not provable in the bankruptcy.

BOWEN, L.J. I am of the same opinion. I agree in the view of the Master of the Rolls as to the moral aspect of the case. It appears to me that arrears of alimony are, within the meaning of s. 5 of the Debtors Act, 1869, "a debt due in pursuance of an order or judgment of a competent Court." Before that the payment of alimony was enforced by proceedings for attachment under the provisions of s. 52 of the Act 20 & 21 Vict. c. 85. Since the Debtors Act was passed the proceeding by attachment has fallen into disuse, and, unless the payment of alimony can be enforced under s. 5 of the Debtors Act, there seems to be no way of enforcing it. I think it is not too wide a construction to say that arrears of alimony are a debt within s. 5, though they do not constitute a debt at law. If authority is wanted, there is the general practice of the Divorce Court, and there is the decision of James, L.J., when V.C., in *Hewitson* v. *Sherwin* (1), that an order of the Court of Chancery for payment of costs constituted a debt enforceable under s. 5. This being sufficient to found the jurisdiction of Cave, J., under the Debtors Act, the question arises whether the defendant is relieved from the obligation to keep his wife alive from year to year by his bankruptcy. I think it would be absurd to say that this obligation is a "debt or liability" provable in bankruptcy. *Prescott* v. *Prescott* (2) is against that view. Though it was decided under the Bankruptcy Act of 1849 the principle of the decision applies now. In *In re Robinson* (3) Cotton and Lindley, L.JJ., explained what the nature of alimony is. The very essence of it is, that it is a monthly or weekly payment for the personal maintenance of the wife. It seems to me that it would be the wildest construction of s. 37 to say that future payments of that kind constitute a debt or liability capable of

(1) Law Rep. 10 Eq. 53. (2) 20 L. T. (N.S.) 331.
(3) 27 Ch. D. 160.

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being proved in bankruptcy. A liability within that section must be something the value of which is capable of being estimated in some way or other. The value of these future payments is certainly not capable of being estimated. And, even if the wife could prove for the future payments, directly she was in want of alimony she would only have to apply to the Divorce Court for a fresh order. I may add that in *Bailey* v. *Bailey* (1) it was not necessary to consider the effect of s. 5 of the Debtors Act.

Solicitor for husband: *W. Gordon Place, Leicester.*
Solicitors for wife: *Field, Roscoe & Co.*

W. L. C.

[IN THE COURT OF APPEAL.]

June 4.

HARRIS AND DIXON *v.* MARCUS JACOBS & Co.

Ship—Charterparty, Construction of—Ready Quay Berth as ordered by Charterer—Demurrage.

By a charterparty it was agreed that the plaintiff's vessel after loading a certain cargo should proceed "to London or Tyne dock to such ready quay berth as ordered by the charterers," "demurrage to be at the rate of 30*l.* per running day," in no case unless in berth before noon were the lay days to count before the day following that on which the vessel was in berth, and the captain or owners were to have an absolute lien on the cargo for all freight and demurrage in respect thereof.

The vessel was ordered by the charterers to a certain London dock, but when the vessel arrived at such dock there was no quay berth ready for her, and she was consequently detained one day beyond the time required for discharging her had she been able to have got alongside a quay berth on her arrival in the dock:—

Held, on the construction of this charterparty, that the charterers were bound to name such a quay berth as was ready, and that for the detention caused by the charterers neglecting to do so the plaintiffs were entitled to a lien on the cargo for demurrage, the damage for the detention being sufficiently in the nature of demurrage to come within the demurrage clause.

By a charterparty made on the 21st of June, 1883, between the plaintiffs and E. J. Hough & Co., for the charter by E. J. Hough & Co. of the plaintiffs' steamer the *Wimbledon*, it was agreed, inter alia, that the said vessel should proceed to Tripoli and there

(1) 13 Q. B. D. 855.

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load a cargo of esparto fibre, and when so loaded should proceed "to London or Tyne Dock to such ready quay berth as ordered by the charterer," "cargo to be delivered as fast as steamer can deliver per working day, weather permitting, Sundays, Bank holidays, Good Friday, and Christmas Day, and accidents excepted." "Demurrage to be at the rate of 30*l.* per running day." "In no case unless in berth before noon shall the lay days count before the day following that on which the vessel is in berth at ports of loading and discharging, ready to load or deliver and notice thereof given in writing." "The captain or owners having an absolute lien on the cargo for all freight, dead freight, and demurrage in respect thereof."

A cargo of esparto fibre was shipped in July, 1883, on board the *Wimbledon*, at Tripoli, under a bill of lading by which the goods were made deliverable to Messrs. E. J. Hough & Co., or their assigns, he or they paying freight for the goods, and performing all other conditions as per charterparty. The vessel was ordered by the charterers to Millwall Dock, London, and she arrived in that dock with her cargo on the evening of the 13th of August, 1883, but there was no quay berth ready there, and owing to the state of the dock as regards vessels she never got alongside a quay berth until the 16th of August. This caused a detention of the vessel in discharging her cargo, in respect of which the plaintiffs claimed a lien for two days' demurrage at 30*l.* a day, according to the charterparty, and in order to secure this the plaintiffs put a stop order on the goods under the powers of the Merchant Shipping Amendment Act, 1862, by landing and placing them with the Millwall Dock Company, subject to the lien of 60*l.* for two days demurrage. The defendants were the owners of such goods, having bought them of the charterers, and they claimed a delivery of the goods by virtue of delivery orders which had been given to them by Messrs. E. J. Hough & Co., under and by virtue of the bill of lading, but in consequence of the said stop order they deposited, as they were obliged to do, 60*l.* with the Millwall Dock Company in order to obtain the goods. The defendants however disputed the plaintiffs' right to the lien, and accordingly they gave the dock company the notice to retain the 60*l.* according to the statute, and the plaintiffs then

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brought this action to establish their right to the lien, and to receive the sum which had been so deposited.

The action was tried in London during last Hilary Sittings, before Mathew, J., without a jury, when that learned judge held that according to the true construction of the charterparty the plaintiffs had a lien for demurrage if the charterers delayed the vessel beyond the time required for discharging her, either by failing to provide her with a quay berth or in discharging her when she was there. He accordingly gave a verdict and judgment for the plaintiffs for 30*l.*, one day's demurrage only, which the plaintiffs agreed to accept, as it appeared from the evidence that the failure to obtain a quay berth ready on the arrival of the vessel had only caused a delay of one day in the discharge of the cargo.

The defendants appealed.

Gully, Q.C., and *D. Walker*, for the defendants. Until the vessel had arrived at her place of destination and the voyage had therefore been completed the lay days would not begin to run. The demurrage in this case could not begin until the vessel had got into a ready quay berth at Millwall Dock, which was the place appointed according to the charterparty as her place of destination: *Murphy* v. *Coffin* (1). The mere fact that this dock was full, so that without the fault of either party there was no quay berth ready when the vessel arrived in the dock, would not give any cause of action for demurrage, and unless there was a claim for demurrage there would be no lien on the goods. Here even as against the charterers the plaintiffs would not be entitled to demurrage, for before that could arise the vessel had to go to her place of destination, "a ready quay berth." The plaintiffs might have a remedy against the charterers in an action for damages for preventing the arrival of the vessel at her place of destination, if the charterers were bound by the charterparty to secure a ready quay berth, but until the vessel had got to such berth there could be no demurrage: *Nelson* v. *Dahl.* (2)

[BRETT, M.R. "Demurrage" is an elastic term: *Sanguinetti* v. *Pacific Steam Navigation Co.* (3). I there said (4) "if the

(1) 12 Q. B. D. 87.
(2) 12 Ch. D. 568; 6 App. Cas. 38.
(3) 2 Q. B. D. 238.
(4) Page 252.

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demurrage clause were to be confined to a certain number of days I should entirely agree that in the clause which gives a lien demurrage is to be enlarged, and will not only include demurrage days proper, but also days of detention where a claim is to be made in the nature of demurrage."]

The facts were different there to what they are in this case. There the vessel had been delivered over to the charterer, and the lay days had begun to run.

W. Baugh Allen, and *J. A. Hamilton*, for the plaintiffs. The case of *Murphy* v. *Coffin* (1) was different from the present one, inasmuch as there the vessel had by the terms of the charterparty not only to go to Dieppe, but also to the railway wharf as ordered by the charterer, and therefore there was no liability to pay demurrage for a delay which had occurred between the ship's arrival at Dieppe and her being berthed at the railway wharf. Here there was an absolute undertaking on the part of the charterers to provide a ready quay berth, and the delay arose from failure of the charterers to do what they had contracted to perform.

Gully, Q.C., replied.

BRETT, M.R. In order to determine this case one must see whether the charterers would be liable if they were in the position of these defendants. That would depend on the construction of the charterparty, and in whose favour the word "ready," which is an express word, was inserted there before the words "quay berth as ordered by charterers." It seems to me that the stipulation that the vessel should proceed "to such quay berth as ordered by the charterers," was one which would be in favour of the charterers, and that when the word "ready" was inserted before "quay berth," that must be in favour of the shipowners, in order that the ship should not be kept waiting until a quay berth was ready. The meaning of the charterparty is, I think, that the charterers undertake to order the ship to go to such dock and to such quay berth there as they may wish, all of which is for their benefit, but with this stipulation in favour of the shipowners, that it shall be to a quay berth which is ready. That being so the charterers would be bound to name a quay berth which was ready, and there was a

(1) 12 Q. B. D. 87.

default on their part in the present case as the quay berth was not ready for the vessel. What, then, in the nature of things would be the only result of that default, so far as at least as the shipowners were concerned? why that the ship would be detained. Then in that case the ship would be detained by reason of the charterers not doing what they had undertaken to do, and for such a detention the parties to the charterparty have agreed that 30*l.* a day should be paid to the shipowners. Demurrage is the agreed amount of damage which is to be paid for the delay of the ship caused by a default of the charterers at either the commencement or the end of the voyage. Here such delay so caused by the charterers took place at the end of the voyage. It is true that the damage in this case is not strictly demurrage, but it is in the nature of demurrage, and the clause as to demurrage in a charterparty is elastic enough in the ordinary construction of a charterparty to comprise such a damage as this. Then 30*l.* is what the shipowners would be entitled in the present case to claim from the charterers for a detention in the nature of a demurrage in consequence of the default of the charterers to name a ready quay berth for the vessel, and as the demurrage clause covers the acts of the defendants the decision of Mathew, J., was right, and must be affirmed.

BAGGALLAY and LINDLEY, L.JJ., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Ingledew, Ince, & Colt.*
Solicitors for defendants: *Lyne & Holman.*

W. P.

1885
June 19.

In re BROAD AND BROAD.

Practice—Costs, Taxation of—Solicitor and Client—Costs of Third Counsel.

The costs of a third counsel that have been disallowed as between party and party come within the principle laid down in the case of *In re Blyth and Fanshawe* (10 Q. B. D. 207), and therefore will not be allowed on taxation as between solicitor and client, unless the solicitor has warned the client that such costs might not be allowed as between party and party.

APPEAL from the decision of a judge at chambers refusing to direct a review of taxation by the master.

The facts were in substance as follows:—The taxation was as between solicitor and client, being a taxation of Messrs. Broad and Broad's bill of costs against E. W. Goodenough in relation to a litigation in which they had been concerned for him as solicitors. A receiver having been appointed to receive the rents of certain property by way of execution in an action, an application was made by Goodenough as a mortgagee of the property to discharge the receivership order. The history and nature of the litigation, in which Goodenough was ultimately successful, his appeal being allowed with costs, are set forth in the report of the case in the Court of Appeal: see *Walmsley* v. *Mundy*. (1) The master, among other items, disallowed the fees and other costs of a third counsel employed by the solicitors for the client upon the hearing in the Court of Appeal which had been disallowed upon taxation as between party and party. The ground of the disallowance was that, although the solicitors had informed the client of the proposed retainer of such third counsel and obtained his sanction thereto, they had not pointed out to the client that such costs might be disallowed as between party and party, and he might have to bear them whatever the result of the appeal might be; and the master consequently was of opinion that the case came within the decision in *In re Blythe and Fanshawe* (2), and that therefore he had no discretion in the matter, but was bound to disallow these costs.

Messrs. Broad & Broad applied for a review of taxation to Lopes, J., at chambers, who refused the application.

(1) 13 Q. B. D. 807. (2) 10 Q. B. D. 207.

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Dunham, for the appellants. It appears from the judgment of the Master of the Rolls in *Walmsley* v. *Mundy* (1) that the case was one of peculiar difficulty and complication, involving the application of equity practice to a matter arising in an action in the Queen's Bench Division. Consequently an additional counsel practising at the equity bar was retained. The case was one therefore in which, if the master had a discretion, he might have thought it right to allow the costs of the three counsel, but he declined to treat the question as one for the exercise of his discretion, being of opinion that he was bound by the decision in *In re Blyth and Fanshawe.* (2) It is submitted that the rule there laid down is not really applicable to such a matter as the costs of a third counsel. The question there related to the costs of shorthand notes of evidence, which have always been considered as an exceptional matter.

[FIELD, J. The Court of Appeal in *In re Blyth and Fanshawe* (2) do not appear to have decided on grounds peculiar to shorthand notes. The principle is laid down as applicable to all unusual expenses which may be disallowed as between party and party.]

The language of the judgment must be read in connection with the subject-matter. So far as it goes beyond what was necessary for the purposes of the case, it is obiter only, and not binding on this Court. It is submitted that the decision cannot apply to every matter which can in any sense be termed unusual. If the principle is applied in that sweeping sense, in most cases of extra costs it might be contended that it is the solicitor's duty to warn the client that they may not be recovered as between party and party, which would be absurd in practice. The costs of a third counsel are not unusual in the sense in which the costs of shorthand notes of evidence are. The number of counsel that should be allowed must depend on the circumstances of the particular case. In a case of great importance or complication it is not unusual to employ more than two counsel, and, under the circumstances of this case, it was reasonable for the solicitors to employ three counsel, and to suppose that they would be allowed even as between party and party. The principle laid down in *In re Blyth and Fanshawe* (2) must be considered as applicable to special and

(1) 13 Q. B. D. 807. (2) 10 Q. B. D. 207.

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exceptional matters ejusdem generis with shorthand notes, and not to such matters as the number of counsel to be engaged, which must be a matter of discretion according to the circumstances of the particular case.

[MANISTY, J., referred to *Smith* v. *Buller*. (1)]

He also cited *In re Snell*. (2)

Walton, for the respondent, was stopped by the Court.

FIELD, J. I think this appeal must be dismissed. The taxation of costs in this case was between solicitor and client. The question is as to the costs of employing a third counsel, which the master has disallowed. We gather from the master's observations that the case was one of some complication: there is no suggestion that the solicitors were guilty of making costs, or that there was any impropriety on their part in employing three counsel: and I think we may almost infer that, if the matter had been one for the master's discretion, he would have been disposed to allow the costs; but he supposed himself to be bound by the principle laid down in the case of *In re Blythe and Fanshawe* (3), and that he had no discretion in the matter, because, though the solicitors had informed their client that they were going to employ a third counsel and obtained his sanction to their doing so, they did not warn him that the costs of such counsel might be disallowed as between party and party, and of the possibility that in consequence he might have to bear them himself whatever the event of the litigation. The case of *In re Blyth and Fanshawe* (3) is no doubt somewhat different from this case in respect of the facts, because the question there arose with regard to the cost of shorthand notes, which is perhaps a somewhat stronger case than the present, but the Court of Appeal there laid down a principle. It was contended that this was merely done obiter, and was not necessary for the decision of the case, and therefore the principle so laid down was not binding on us. I am of opinion, however, that, when the Court of Appeal clearly lays down a general principle as the ground of their decision in the case before them, we are bound to follow it. Baggallay, L.J., in delivering judgment in

(1) Law Rep. 19 Eq. 473. (2) 5 Ch. D. 815.
(3) 10 Q. B. D. 207.

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IN RE BROAD AND BROAD.

that case, says: "I take it to be the general rule of law, and an important rule, that is to be observed in all cases, that, if an unusual expense is about to be incurred in the course of an action, it is the duty of the solicitor to inform his client fully of it, and not to be satisfied simply by taking his authority to incur the additional expense, but to point out to him that such expense will or may not be allowed on taxation between party and party, whatever may be the result of the trial." Lindley, L.J., said: "It was the duty of the solicitors to Mr. Wells to give him advice and protection against unnecessary expense, and to point out to him that if he chose to engage shorthand writers the cost of having the transcripts of shorthand notes might not be allowed as between party and party."

In laying down this rule it seems to me that the Court of Appeal were acting on a general principle applicable not merely to shorthand notes but to other matters of a similarly exceptional character. The only question that remains seems to be whether the employment of a third counsel comes within the category of being such an unusual matter as to be within the principle laid down. My Brother Manisty has referred to the case of *Smith* v. *Buller* (1), as illustrating the general practice on the subject. There Malins, V.C., lays it down as the ordinary rule that the fees of only two counsel are allowed, and that it requires very exceptional circumstances to justify a departure from that rule. It seems to me that the case is one which falls within the principle of the decision in *In re Blyth and Fanshawe* (2), and therefore I think that the master was right in considering himself bound by that case. For these reasons I think the master's taxation was correct, and this appeal must be dismissed.

MANISTY, J. I am of the same opinion, and for the same reasons.

Appeal dismissed.

Solicitors for appellants: *Broad & Broad.*

Solicitors for respondent: *Sandom, Kersey, & Knight.*

(1) Law Rep. 19 Eq. 473. (2) 10 Q. B. D. 207.

E. L.

1885
June 23.

[IN THE COURT OF APPEAL.]

HOGG *v.* BROOKS.

Landlord and Tenant—Power to determine Tenancy by delivering Notice to Tenant—Tenant not to be found—Delivery of Notice at demised Premises.

A lease of premises for twenty-one years contained a proviso that it should be lawful for the landlord or his assigns to put an end to the demise at the end of the first fourteen years by delivering to the tenant or his assigns six calendar months previous notice in writing of his intention to do so. In an action by the assignee of the reversion to recover possession of the premises on the ground that the demise had been duly determined by notice under the proviso, it appeared that the lessee had disappeared some years previously, after having mortgaged the premises by way of underlease, that his address could not be found, and that written notice to determine the tenancy directed to him had been sent to his last known address, and had also been delivered to the mortgagee and to the occupier of the premises:—

Held, that the action could not be maintained, as there had been no service of the notice on the lessee, and as he had not assigned the premises no other service would satisfy the terms of the proviso.

EJECTMENT to recover possession of a shop in Regent Street, Marylebone. At the trial before Mathew, J., without a jury, it appeared that the plaintiff was the assignee of the reversion of a lease of the premises sought to be recovered, which had been granted in March, 1870, by the Royal Polytechnic Institution, Limited, to one Richard Curtis for twenty-one years from the 24th of June, 1870. The lease contained the following proviso: "It shall be lawful for the landlords to put an end to this present demise at the end of the first fourteen years thereof by delivering to the tenant, his executors, administrators, or assigns, six calendar months' notice in writing of their intention to do so." Curtis, the lessee, shortly after he became tenant, mortgaged the demised premises by way of sub-lease to a Mr. Purkis, who took possession and let the premises to the defendant. The plaintiff being desirous to determine the lease of 1870, gave a notice to that effect in a letter sent by the post directed to Curtis at his last known address, but the letter was returned without having ever reached Curtis, who, it was admitted, had disappeared and could not be found. The plaintiff then directed a similar notice to Purkis and the defendant, as well as to Curtis, and served the same on Purkis and the defendant.

The learned judge at the trial held that such notice was not

sufficient to determine the tenancy, as the notice, to be within the terms of the lease, could only be served by delivering it to Curtis, and he accordingly directed judgment to be entered for the defendant. The case is reported. (1)

The plaintiff appealed.

Finlay, Q.C., and *Nicoll*, for the plaintiff, contended, as at the trial, that Curtis, the lessee, could not by keeping out of the way prevent the plaintiff from determining the tenancy, and that service of the notice upon the occupier of the premises was sufficient: *Blair* v. *Street* (2); Bac. Abr. title "Conditions" Q. "of the act of the parties," citing Co. Litt. 210 b, and Com. Dig. title "Condition" L (5).

W. Allen, appeared for the defendant, but was not called on.

BRETT, M.R. In this case there was a lease for a certain number of years of the premises sought to be recovered, and which lease would be still continuing if nothing were done to determine it; but by a clause in it the parties have stipulated that if one thing be done the landlord may put an end to it, and in my opinion the Court must construe that clause according to the ordinary meaning of the English language. The parties to the lease have stipulated that the landlord may put an end to the lease if notice in writing to that effect be delivered to the tenant or his assigns, and it is as plain as can be that unless such notice be served by delivering it to the tenant or his assigns, the landlord has not fulfilled the condition on which alone he can put an end to the lease. Here there was no assign of the tenant, because the mortgage was by way of sub-lease, and the only person on whom the notice could be served in order to fulfil the terms of the proviso was the tenant Curtis himself; but on him the notice has not been served. Therefore the plaintiff is not entitled to recover possession of the premises.

BAGGALLAY and BOWEN, L.JJ., concurred.

Appeal dismissed.

Solicitors for plaintiff: *Clarke, Rawlins, & Co.*

Solicitors for defendant: *Purkis & Co.*

(1) 14 Q. B. D. 475. (2) 2 Ad. & E. 329.

Distinguished. SELIGMAN *v.* DOCKER. [1948] 2 All E.R. 887.

Considered. SELIGMAN *v.* DOCKER. [1949] Ch. 53

1885
May 12.

FARRER *v.* NELSON AND ANOTHER.

Game—Reservation of Right of Shooting—Overstocking Land with Game—Injury to Crops—Right of Action.

Where land is let to a tenant reserving the right of shooting over the land, the tenant may maintain an action against the persons entitled to the right of shooting for overstocking the land with game so as to cause damage to the tenant's crops.

APPEAL by case from the County Court of Westmoreland.

The action was for damages caused by the defendants overstocking the plaintiff's farm with game, the defendants having the right of sporting over the plaintiff's farm. At the trial in November, 1884, it appeared that the plaintiff was the tenant to Walter C. Strickland, of Sizergh Castle, Westmoreland, of a farm (exclusive of the woods and coppices) at Low Sizergh, near Kendal, under a deed dated September, 1881, to which they were parties. The sporting and shooting rights over the farm were by the deed reserved to Strickland.

The defendants, by indenture of lease dated May, 1883, between Strickland and the defendants, became lessees of the shooting and sporting rights over the Sizergh Castle estate, of which the farm leased to the plaintiff forms part. It was proved that the defendants, by their gamekeepers, had during the spring, summer, and autumn of 1884 reared in coops elsewhere than on the plaintiff's farm, but on another part of the Sizergh Castle estate, about 1500 pheasants, and had carried in the coops about 450 of these pheasants into a coppice wood which is situate on the plaintiff's farm, but is reserved to the landlord in the plaintiff's lease. About an acre of the coppice wood had been cut down for the purpose of rearing pheasants, into which the 450 pheasants were brought, and the part of the coppice wood so cut down adjoined to within about five yards of the fence dividing the coppice wood from the plaintiff's field in which the damage complained of was done. As many as 100 pheasants at a time had been seen running in the plaintiff's field adjoining the coppice in the month of August, when the plaintiff's grain and other crops were ripening. The field in which the damage was done covered an area of about

twenty-seven acres, and the coppice wood in which the pheasants were placed covered altogether an area of about eighty acres.

It was admitted by the defendants that 300 to 400 pheasants had been placed as before mentioned, and that some of these pheasants had from time to time come out of the wood and alighted upon the plaintiff's farm, and by feeding upon his crops had done damage to the amount claimed in the action. The judge held that the plaintiff was entitled to recover the amount of the damage so occasioned, and gave judgment for the plaintiff for the amount claimed by him. The question for the Court was whether or not the plaintiff upon the facts above stated was entitled to recover the damages claimed by him.

W. R. Kennedy, for the defendants. Upon the facts stated in the case the plaintiff has no cause of action. The defendants had the right of shooting over the land, and it was necessary for the reasonable enjoyment of this right that they should be at liberty to stock the land with pheasants. No precedent can be found for such an action as this. In *Boulston's Case* (1) it is stated as a proposition of law, that if a man makes coney-boroughs on his own land, which increase in so great a number that they destroy his neighbour's land next adjoining, his neighbour cannot have an action on the case against him who made the coney-boroughs, but so soon as the coneys come on his neighbour's land he may kill them. It is true that in a modern case, *Birkbeck* v. *Paget* (2), Sir J. Romilly held that an agreement giving the right of shooting and sporting did not justify the licensee in breeding and turning out on the farm rabbits and pheasants bred on other lands. There, however, new game was brought on the land. Here the game was only shifted from one part of the farm to the other. *Hilton* v. *Green* (3) merely shews that the lessee of the right of shooting may be liable for damage done by rabbits which he has turned on the farm without the licence of the occupier. If the tenant of the land wishes to protect his crops from damage he must make it a term of the reservation of the right of shooting that no such damage shall be done.

(1) 5 Rep. 212. (2) 31 Beav. 403.
(3) 2 F. & F. 821.

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W. R. Smith, for the plaintiff, was not heard.

POLLOCK, B. This case is new and interesting, but I entertain no doubt that the decision of the county court judge was, in law, correct. I will first deal with the question whether an action can be brought by a neighbour against any person who collects animals upon his land so as to injure the crops of the neighbour, and I should say that beyond doubt such an action would lie, and that the rule upon which it would be founded would be not so much negligence as upon an infraction of the rule, "sic utere tuo ut alienum non lædas." I agree, however, that this does not solve the question before us. It is not merely the case of a man collecting noxious animals upon his land so as to injure his neighbour, but the case of a man entitled to keep game upon the land, and the tenant complaining of injury to his crops from this game being unduly multiplied. As I understand the law each person in this country is entitled to bring on his land any quantity of game which can reasonably and properly be kept on it, and so that nothing extraordinary and non-natural is done. The case of *Birkbeck* v. *Paget* (1), which was cited by the counsel for the defendants to shew that there is a difference between introducing fresh game and shifting game from one part of the land to another, is at any rate an authority that the lessee is not warranted in introducing into the land game not bred in the ordinary way. So here, so long as the lessee of the right of shooting was exercising the ordinary rights which the landlord who had reserved the right might have exercised, he was acting within his rights, but the moment he brings on game to an unreasonable amount or causes it to increase to an unreasonable extent, he is doing that which is unlawful, and an action may be maintained by his neighbour for the damage which he has sustained.

DAY, J., concurred.

Judgment for the plaintiff.

Solicitor for plaintiff: *E. Warriner.*
Solicitors for defendants: *Crowther & Miller, Liverpool.*

(1) 31 Beav. 403.

A. P. S.

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May, 8, 20.

Vendor and Purchaser—Contract—Restrictive Covenants, non-disclosure of—Right to rescind—Conditions of Sale precluding Objections as to Omissions in Contract, Effect of—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-ss.* 3, 11.

The owner in fee of land sold and conveyed it, during the years 1865, 1866, and 1867, in thirteen lots to different purchasers, each lot being subject to covenants entered into by the purchasers restricting the use of the land as a brickyard and in other respects. The defendant subsequently became the purchaser of Lot 11, but the deed of conveyance to him did not contain the restrictive covenants. In 1882, the plaintiffs, a company for manufacturing bricks, contracted to purchase Lot 11 from the defendant under conditions of sale which stated that the property was sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not; and provided that any error or omission in the particulars should not annul the sale, nor entitle the purchaser to compensation. The existence of the restrictive covenants was not mentioned in the contract, but during the negotiations the defendant stated that there were covenants restricting the use of the land as a brickyard, but his solicitor, who was present and to whom the plaintiffs' solicitor applied for information, stated that he was not aware of any such covenants. The plaintiffs paid a deposit upon the purchase-money, and having subsequently discovered that there were restrictive covenants, claimed to rescind their contract and sued the defendant to recover the amount of the deposit:—

Held, that the plaintiffs, if their contract with the defendant were carried out, would be bound by the restrictive covenants, and that the owners of the other twelve lots purchased from the original vendor would be entitled to enforce those covenants against the plaintiffs; that the plaintiffs were not precluded by the terms of the conditions of sale, nor by s. 3, sub-s. 3, of the Conveyancing Act, 1881, from refusing to complete the purchase, and that they were therefore entitled to recover the amount of the deposit.

ACTION tried before Wills, J., without a jury. The material facts proved in evidence, or admitted, at the trial are stated in the judgment of Wills, J. (1)

A. Charles, Q.C., and *W. Graham*, for the defendant. The defendant is entitled to judgment. The plaintiffs are not bound by the restrictive covenants, which were not mentioned in their contract; nor are the purchasers of the other lots from the original vendor entitled to enforce those covenants against the plaintiffs, there being no contract or representation that the purchasers

(1) Post, p. 263.

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were to have the benefit of them: *Renals* v. *Cowlishaw* (1); *Keates* v. *Lyon* (2); *Master* v. *Hansard* (3); *Duke of Bedford* v. *Trustees of British Museum*. (4) Secondly, the conditions of sale under which the plaintiffs bought Lot 11, preclude any inquiry with respect to the existence of the restrictive covenants. Assuming that the defendant honestly thought as a matter of law that the restrictive covenants would not bind the plaintiffs, he would not be compelled to disclose their existence: Dart's Vendors and Purchasers, 5th ed., vol. 1, pp. 134 to 138. In *Heywood* v. *Mallalieu* (5) there was fraud on the part of the vendor. That case therefore does not apply here. The plaintiffs are also precluded by the terms of the Conveyancing Act, 1881, s. 3, sub-s. 3 (6) from raising this objection.

Sir F. Herschell, S.G., Mellor, Q.C., and *R. M. Bray*, for the plaintiffs. The first purchaser of Lot 11 from the original vendor bought subject to the restrictive covenants, and subsequently sold the land without the restrictions. It is clear upon the authorities that the restrictions were not thereby got rid of, and that any subsequent purchaser with notice would be bound by them:

(1) 11 Ch. D. 866.
(2) Law Rep. 4 Ch. 218.
(3) 4 Ch. D. 718.
(4) 2 My. & K. 552.
(5) 25 Ch. D. 357.
(6) Sub-s. 3 of s. 3 of the Conveyancing Act, 1881, enacts as follows:—"A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, inrolment, or otherwise."

Sub-s. 11 provides that "nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the Court."

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Wilson v. *Hart* (1); *Patman* v. *Harland*. (2) The purchasers of all the other lots from the original vendor would be entitled to enforce performance of the restrictive covenants against the plaintiffs—the intention being that these covenants should enure for the mutual benefit of them all, and not for the benefit of the original vendor: *Western* v. *McDermott* (3); *Nicoll* v. *Fenning*. (4) In *Renals* v. *Cowlishaw* (5) there were no mutual covenants. That case therefore does not apply. The conditions of sale do not preclude the plaintiffs from refusing to complete the purchase. General words such as are found in these conditions cannot preclude a purchaser from saying that the subject-matter of the contract was not properly described: *Heywood* v. *Mallalieu* (6); Dart's Vendors and Purchasers, 5th ed., pp. 113, 114. As to the Conveyancing Act, 1881, sub-s. 11 of s. 3 expressly gives the right to take objections which would be an answer to an action for specific performance of the contract.

Cur. adv. vult.

May 20. WILLS, J., delivered the following judgment:—The plaintiffs sue the defendant to recover the sum of 610*l.* paid by the plaintiffs to the defendant as a deposit upon the intended purchase by the plaintiffs from the defendant of a piece of land.

The land in question was put up for sale by auction on the 26th of September, 1882, but was not sold at the auction. Immediately afterwards the plaintiffs, by their solicitor, Mr. Hinde, entered into negotiations, first, with the auctioneer and then with the defendant himself, in the course of which the defendant told Mr. Hinde that there were restrictive covenants applicable to the land which would prevent its being used as a brickfield. The defendant's solicitor, Mr. Gilbert, who was present, was appealed to by Mr. Hinde as to whether this was correct, and he replied that he was not aware of any. Thereupon the defendant said that he had seen the restrictions in one of the old deeds; and upon Mr. Hinde repeating his appeal, Mr. Gilbert again answered that he was unaware of any restrictions. Mr. Gilbert did not add that, with-

(1) Law Rep. 1 Ch. 463.
(2) 17 Ch. D. 353.
(3) Law Rep. 2 Ch. 72.
(4) 19 Ch. D. 258.
(5) 11 Ch. D. 866.
(6) 25 Ch. D. 357.

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out which his answers were misleading, viz., that he had not read the earlier deeds, and knew nothing of their contents. One of the directors of the plaintiff company, who was present, thereupon signed on behalf of the plaintiff company a contract to purchase the piece of land at the price of 6100*l.*, and a deposit of 10 per cent. was paid to the defendant. The contract contained a description of the piece of land proposed to be sold, but was silent as to its being subject to any restrictions upon the full proprietary rights of the purchaser of a freehold; and also contained the following conditions:—

"4. The property is sold subject to all tenancies, tenant rights, chief and other rents, tithe, rights of way, water, light, and other easements, and also to an arrangement entered into with the Nottingham Waterworks Company for removing from time to time and laying down along the private road, called Plains Road, new main water-pipes, and also to the payment of a rateable proportion of the expense of keeping the said private road and gate at the end thereof next Mapperley Plains in good condition, and also subject to any matter or thing affecting the same whether disclosed at the time of sale or not."

"10. The title shall commence with an indenture of conveyance, dated the 20th day of May, 1868, and made between Henry Conway Barnett of the first part, Harriett Maltby, spinster, of the second part, and William Windley, of the third part."

"12. The property is believed to be, and is to be taken to be, correctly described, and any incorrect statement, error, or omission found in the particulars or these special conditions is not to annul the sale, nor entitle the purchaser to be discharged from his purchase, nor is the vendor or purchaser to claim to be allowed any compensation in respect thereof."

About the 9th of December, 1882, the plaintiff discovered that the property so bought was one of a number of bits of land which had in the years 1865, 1866, and 1867, been sold by the same vendor to different purchasers subject in each case to conditions imposing restrictions on the cost, and details of construction, of any house to be built upon the land bought; and forbidding the use of it for various purposes of trade or manufacture, and especially as a brickyard or for making bricks. The plaintiffs,

thereupon, after some correspondence, of which it is unnecessary to go into the details, threw up the purchase, and brought this action to recover the deposit which they had paid.

I will dispose at once of the conversation which preceded the signing of the contract. Assuming that the land was subject to the restrictions in question, I think that the conduct of Mr. Gilbert would have been sufficient, if the defendant were responsible for it, to have avoided the contract altogether. The evidence for the plaintiffs put it in a light still less favourable than the version I have given, which is that narrated by Mr. Gilbert himself. But it is not necessary to discuss the discrepancies upon this point. Upon his own shewing Mr. Gilbert's answers were disingenuous, and could not fail (if relied upon) to mislead the plaintiffs; and, had they been given by the defendant, I should have had no hesitation in saying that a contract so procured could not stand. But both sides are agreed that the defendant himself was perfectly honest in the matter, and told all that he knew about the restrictive conditions; and, under the circumstances, it is impossible to treat Mr. Gilbert as the agent of the defendant to make the statements in question, whether Mr. Gilbert's version or Mr. Hinde's be adopted. The conversation, therefore, seems to me to leave the matter just where it would have been had no such conversation passed. The contract, having been signed, speaks for itself and defines the rights of the parties; and whatever might be the effect of the notice thus given to the intending purchaser of the restriction as to the use of the land as a brick-field, it is clear that no mention was made of the other equally material restrictions; and it is also equally clear upon the evidence that until the beginning of December, 1882, the plaintiffs had neither knowledge nor notice of them.

It appeared that the plot in question (containing about six-and-a-half acres) was part of a property of about forty-two or forty-three acres which was, on the 24th of March, 1865, put up for auction in thirteen lots. Amongst the conditions of sale were the following:—

"15. All buildings to be erected on any part of the said lands shall be stone coloured, with slated roofs; and no building to be occupied as a public-house or work-shop, or blacksmith's shop, or as a butcher's shop or slaughter-house, or chandler's house or shop,

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or as a shop for the sale of any article whatsoever, or for the purpose of using, working, or making any article of manufacture therein, shall be erected or built or so used upon any part of the land now offered for sale; nor shall any part thereof be used as a brickyard, or for the making of bricks, except Lot 13; and in case the property shall be sold in lots, no house shall be erected on any part of the said land, except on Lot 13, at a less cost than 400*l*.

"16. The purchaser of the property, or of each lot in case the same shall be sold in lots, shall enter into all such covenants with the vendors as the vendors' counsel shall deem necessary or proper for securing the performance of these conditions on the part of such purchaser, which covenants shall be inserted in his deed of conveyance; and he shall also, in conjunction with the other purchasers (if any), enter into and execute a separate deed containing like covenants with the vendors, such separate deed being prepared at the expense of the vendors, but perused on behalf of such purchaser or purchasers respectively, and executed at his or their expense."

At this sale Lots 1 and 2 were sold. In February, 1866, there was a second auction at which Lots 6, 7 and 8 were sold. In October, 1867, there was a third auction, at which Lots 9 and 10 were sold.

I am satisfied upon the evidence that the whole of these lots were sold upon the same terms. The solicitor and auctioneer who conducted the sales both believe that the conditions were the same. The solicitor who produced his bill book containing an elaborate history of the dealings with the property had in it no charge for altering the conditions on the occasion of the second or third sale. The same person purchased Lots 1, 6, 7, 8 and 12. His deed of purchase of Lot 8 (sold at the second sale) and Lot 12 (sold at the first sale) were produced, and both contained the restrictive covenants in question. The deeds of purchase of Lots 9 and 10 (sold at the third auction) were also put in, and they contained the same covenants. Lot 2 was sold at the first auction, but there was no direct evidence of the terms of the conveyance. Lots 3, 4 and 5 were sold in 1865, 1866, and 1867, by private contract to various purchasers, and there was no evidence as to the terms upon which they were sold. Lot 11 (the lot contracted to be purchased

by the plaintiffs in 1882, and now in question), was sold by private contract, and the deed of sale, bearing date the 4th of September, 1866, contained the restrictive conditions. Lot 13 was sold by private contract in June, 1866, and the deed by which it was conveyed contained, with the exception of a permission to build a blacksmith's shop, such of the restrictions as were applicable to Lot 13. That lot was then a brickfield, and the permission to build a blacksmith's shop was, under the circumstances, a matter of the smallest possible consequence to any person interested in the observance of the restrictions.

I entertain, therefore, no doubt that the whole of the lots sold at the three auctions were sold subject to the restrictions in question, as well as Lot 11, and (with the modification of them above mentioned) Lot 13—both of which were sold by private contract; and as to Lots 8, 9, 10, 11, 12, and 13 the matter was placed beyond a doubt by the production of the deeds by which the common vendor conveyed to the various purchasers. Some of the persons who had bought from the original vendor were shewn to have resold without any restrictions being mentioned in the deeds by which they conveyed to their respective purchasers. Lots 2 and 3, part of Lot 4, and Lot 11, were shewn to have been so dealt with. On the other hand Lots 8, 9, 10 and 12 were shewn to have been sold by every successive vendor by deeds containing the restrictions; and it appeared that every house that has been built upon any part of the original estate has conformed to the covenant as to cost, and in part to the covenant as to colour—that is to say—the fronts of all the houses have been white, though in some instances the backs, and in many instances the stables, have been red. No shop or building for manufacture has been put up on any of the lots, and none has been used as a brickfield. Most of the houses have been slated.

Under these circumstances the plaintiffs contended that they were not bound to complete their purchase; that they had bought a property which was in fact subject to serious restrictions upon its profitable use by a contract which contained no reference to the restrictions, and that there was nothing in the contract to prevent them from taking advantage of this objection.

On behalf of the defendant it was argued that there were no

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restrictive conditions applicable to the property bought by the plaintiffs, and that, if there were, the plaintiffs were precluded by the conditions cited from raising the objection; and it was said that this contention was supported by the Conveyancing Act, 1881 (44 & 45 Vict. 41), s. 3, sub-s. 3.

Three questions appear to me to arise:—1st, whether the plaintiffs as purchasers were bound by the restrictive covenants contained in the deed of the 4th of September, 1866, which was the root of the defendant's title; 2ndly, whether there was any one entitled to enforce those covenants against them; and, 3rdly, whether they were precluded by the conditions of their contract from insisting upon the objection.

Upon the first question it appears to me to be abundantly clear upon the authorities that a purchaser with notice of such restrictive covenants is bound by them. The cases are collected in Dart on Vendors and Purchasers, 5th ed. p. 767; and to them may be added *Hart* v. *Wilson* (1) and *Patman* v. *Harland.* (2) Indeed this point was hardly seriously contested in the very able argument of Mr. Charles.

The second presents much more difficulty: Was there any one in the present case entitled to enforce, as against the plaintiffs, had they become the purchasers of Lot 11, the restrictive covenants in question?

The principle which appears to me to be deducible from the cases is that where the same vendor selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them inter se for their own benefit.

(1) Law Rep. 1 Ch. 463. (2) 17 Ch. D. 353.

Where, for instance, the purchasers from the common vendor have not known of the existence of the covenants, that is a strong, if not a conclusive, circumstance to shew that there was no intention that they should enure to their benefit. Such was the case in *Keates* v. *Lyon* (1); *Master* v. *Hansard* (2); and *Renals* v. *Cowlishaw* (3). But it is in all cases a question of intention at the time when the partition of the land took place, to be gathered, as every other question of fact, from any circumstances which can throw light upon what the intention was: *Renals* v. *Cowlishaw.* (4) One circumstance which has always been held to be cogent evidence of an intention that the covenants shall be for the common benefit of the purchasers is that the several lots have been laid out for sale as building lots, as in *Mann* v. *Stephens* (5); *Western* v. *Macdermott* (6); *Coles* v. *Sims* (7); or, as it has been sometimes said, that there has been "a building scheme:" *Renals* v. *Cowlishaw.* (8) In some instances the exhibition to intending purchasers of a plan embodying such a scheme has been relied upon. Obviously, however, this is a mere detail of evidence, and is by no means necessary in order to establish the existence of such a scheme. It appears to me that, where land is put up to auction in lots, and two or more persons purchase according to conditions of sale containing restrictions of the character of those under consideration in the present case, it is very difficult to resist the inference that they were intended for the common benefit of such purchasers, especially where the vendor purposes (as in the present case) to sell the whole of his property. Where he retains none how can the covenants be for his benefit; and for what purpose can they be proposed except that each purchaser, expecting the benefit of them as against his neighbours, may be willing on that account to pay a higher price for his land than if he bought at the risk of whatever use his neighbour might choose to put his property to? Where, therefore, the vendor desires to sell at the auction the whole of his property, the inference is strong that such covenants are for the common benefit of the purchasers; and it seems to me that the strength of this evidence is not diminished by the fact that at the sale a considerable number

(1) Law Rep. 4 Ch. 218.
(2) 4 Ch. D. 718.
(3) 9 Ch. D. 125; 11 Ch. D. 866.
(4) 9 Ch. D. 125, 129; 11 Ch. D. 866.
(5) 15 Sim. 377.
(6) Law Rep. 2 Ch. 72.
(7) Kay, 56; 5 D. M. & G. 1.
(8) 11 Ch. D. 866, 867.

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of the lots may fail to find purchasers. In the present instance the vendor put up the lots for sale by auction three times, and always on the same conditions. Is it possible to doubt that he intended, and that the purchaser understood, that the covenants should enure to the benefit of every purchaser? The inference is strengthened in this case by the fact that, so far as has been ascertained one way or the other, the purchasers by private contract of the lots not sold by auction were, with an exception so trifling as hardly to be worth notice, put under the same restrictions; and by the fact that the most important of the restrictive covenants have for nearly twenty years been observed by the several purchasers and their assigns. In *Western* v. *Macdermott* (1) very little weight was given by the Lord Chancellor to the fact that in some minor particulars no one of the several purchasers had thought it worth while to insist upon the performance of the covenants; and so here I am not disposed to attach any importance to the fact that the covenants as to the colour of the buildings to be erected on the plots sold, and as to the slate roofing, have not been in all respects strictly adhered to.

I come to the conclusion, therefore, that these covenants were meant by the vendor to be for the benefit of purchasers generally; that certainly the purchasers at the several auctions, and probably all those who bought by private contract, were aware that the other lots were being sold, or would be sold, upon the same terms, and that they bought on the faith that these conditions would be observed all over the property of the common vendor. If so, the purchasers of most, if not all, of the thirteen lots comprised in the particulars of sale of 1865, other than Lot 11, were entitled to the benefit of the restrictive covenants entered into by the purchaser of Lot 11. It is clear upon the authorities that their assigns have the same rights as the original purchasers, and there were, therefore, persons who could have enforced against the plaintiffs, had they completed their purchase, the restrictive covenants in question.

The plaintiffs therefore are primâ facie relieved from the obligation to fulfil the contract, and it remains only to consider the third question, viz., whether the conditions of the contract preclude them from taking the objection.

(1) Law Rep. 2 Ch. 72.

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The 4th condition provides that the property is sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not. Such a condition, however, does not relieve the vendor from the necessity of disclosing any incumbrance or liability of which he is aware, but simply protects him if it should afterwards turn out that the property is subject to some burden or right in favour of a third person of which he is unaware: Dart on Vendors and Purchasers, 5th ed. p. 156. It would be nothing short of a direct encouragement to fraud if a vendor were at liberty by a condition of this kind to sell to a purchaser as an absolute and unburdened freehold a property which he knew to be subject to liabilities which would materially reduce its market value. In the present instance the vendor knew of some of the restrictions, and had the means of knowledge of all of them, and he cannot escape from the necessity of fairly disclosing them by omitting to make himself acquainted with his deeds, or by forgetting their contents. In honesty and in law alike he was bound to give the purchaser full and fair information what it was that he had for sale, and was inviting him to buy, and, having failed to do so, he cannot insist upon the bargain procured by the suppression of material matters affecting the nature of the subject of sale. I entirely acquit the defendant of anything like intentional misconduct, but in the preparation of the particulars of sale he unfortunately relied upon his solicitor, who, as I cannot help believing, was under the mistaken impression that he could better the position of the vendor by abstaining from making himself acquainted with the contents of the earlier deeds in his possession, and open to his perusal.

The 10th condition provides that the title shall begin with a deed of May 20, 1868, subsequent to that which contained the restrictive covenant in question. It is clear, however, that such a condition does not preclude the purchaser from raising a well founded objection to the title arising from facts which he has discovered from collateral sources: *Waddell* v. *Wolfe*. (1)

The 12th condition provides that any error or omission in the particulars is not to annul the sale, nor to entitle the purchaser to compensation. It is, however, settled law that such a condition

(1) Law Rep. 9 Q. B. 515.

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will not protect the vendor where the misdescription, being of such a nature as but for the condition would avoid the contract, is due to the wilful reticence or negligence of the vendor: Sugden, p. 28; Dart, 5th ed., p. 134.

In *Heywood* v. *Mallalieu* (1) property had been sold under conditions practically the same as the three relied upon by the defendant in the present case. The purchaser discovered that it was subject to an easement undiscovered by the particulars of sale. The vendor knew of the easement. It was held by Bacon, V.C., that he could not insist upon the sale, and that the purchaser was entitled to recover the deposit he had paid. Upon the points now under discussion, *Heywood* v. *Mallalieu* (1) seems undistinguishable from the present case, and is a distinct authority in favour of the plaintiffs.

It was contended, however, that greater efficiency is given to conditions such as those which I have discussed by the Conveyancing Act of 1881 (44 & 45 Vict. c. 41), s. 3, sub-s. 3. This enactment, however, is a mere legislative application to every sale of a condition of the same general character as those under discussion, and there can, as it seems to me, be no reason for giving to it a meaning which would amount to a legislative repeal of doctrines established at the date of the passing of that Act by numerous decisions, and by the thoroughly settled practice of conveyancers. On the contrary, sub-s. 11 of the same section shews clearly that it was not intended to have any such effect, or to qualify the principles upon which the Courts were at that time in the habit of acting in granting or refusing specific performance in such cases.

I have come, therefore, to the conclusion that the plaintiffs are justified in refusing to complete their purchase, and entitled to a return of their deposit; and my judgment must be for the plaintiffs for the sum of 610*l.* and costs.

Judgment accordingly.

Solicitors for plaintiffs: *Torr, Janeways, Gribble, & Oddie,* for *Wells & Hind, Nottingham.*

Solicitors for defendant: *Aldridge, Thorn, & Morris,* for *Towle, Gilbert, & Sons, Nottingham.*

(1) 25 Ch. D. 357.

W. A.

MOORHOUSE *v.* LINNEY AND ASHTON.
THORPE *v.* LINNEY AND ASHTON.

1885
May 22.

Municipal Corporation—Election of Councillors—Nomination Paper—Signature of assenting Burgess—Defect in Entry on Burgess Roll—Variance—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 241.

A nomination paper at an election of town councillors was subscribed with the full and correct name of "Charles Arthur Burman" as an assenting burgess; but his name was erroneously entered upon the burgess roll as "Charles Burman" only:—

Held, that the defect was not such as was remedied by 45 & 46 Vict. c. 50, s. 241, enacting that "no misnomer or inaccurate description of any person . . . . named in any roll . . . . required by this Act shall hinder the full operation of this Act with respect to that person . . . . provided the description of that person . . . . be such as to be commonly understood."

The words "commonly understood" in this proviso mean "commonly understood by any person comparing the nomination paper and the burgess roll."

SPECIAL CASE. It set out the circumstances under which the validity of the election of the petitioners as councillors for a ward of the borough of Stalybridge was disputed.

The facts, shortly stated, were as follows:—

The nomination papers were subscribed by assenting burgesses, and amongst others by one whose signature and number on the burgess roll appeared thus:—

Signature.	Number on Burgess Roll with the Ward or Polling District.
Charles Arthur Burman . .	467 Dukinfield Ward Polling District.

A formal objection was made that Charles Arthur Burman was not upon the burgess roll, and therefore ineligible to subscribe to such nominations.

The mayor allowed the objection on that ground, and the respondents were declared duly elected.

Charles Arthur Burman, who subscribed the nomination papers, was duly qualified to be enrolled on the ward roll, and the names Charles Arthur Burman were the surname and other names in full of the person who was intended to be enrolled in the ward

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MOORHOUSE v. LINNEY. THORPE v. LINNEY.

roll by the name of Charles Burman. The number (467) given in the nomination papers as the number on the burgess roll of Charles Arthur Burman was the number on the ward roll of the said Charles Burman. Charles Arthur Burman and his brother Joseph Burman lived together as joint occupiers at No. 61, Caroline Street, in that part of the township of Dukinfield which was in the municipal borough of Stalybridge, and carried on business there as butchers in partnership under the style or firm of "Burman Brothers." "Burman," "Butcher," appeared over the door of 61, Caroline Street. Joseph Burman was enrolled in the ward roll, and his number on such roll was 466.

[Par. 8 of the special case, alleging that there were no other persons of the name in the town, and that any one inquiring for Charles Burman would have been directed to Charles Arthur Burman, who was generally known to his friends as Charles Burman, is set out at length in the judgment of the Court.]

The material part of the entry in the roll was as follows:—

M. 466.	Burman, Joseph	61 Caroline Street, &c.
M. 467.	Burman, Charles	61 Caroline Street, &c.

The petitioners in due course petitioned against the return of the respondents.

The Court was at liberty to draw inferences of fact.

The question was:—Whether the mayor was right, in the circumstances mentioned in the special case in allowing the objections to the respective nominations of the petitioner. If he was right the petitions were to be dismissed.

Sir F. Herschell, S.G. (*Aspland* with him) for the petitioners. The nomination was good. The reference in the nomination paper to the number on the burgess roll was right. Both the christian and surname stated were right. There was no one else in the town of the same name. Charles Burman was well known, and no one could be misled by the insertion of the second christian name in the nomination paper.

First, the omission of a second christian name from the entry

on the burgess roll is not a variance which can invalidate the nomination: *Attorney General* v. *Hawkes*. (1)

Secondly, the defect, if any, is cured by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 241 enacting that "No misnomer or inaccurate description of any person, ... in any roll, list, notice, or voting paper required by the Act, shall hinder the full operation of this Act with respect to that person . . . . ., provided the description of that person . . . . be such as to be commonly understood." The inaccurate description is in the roll.

By s. 51 a person is entitled to subscribe a nomination paper if he is enrolled in the burgess roll. By the third Sched. Part II., r. 1, the candidate must be nominated in writing; by rule 2, the writing must be subscribed by two burgesses of the ward as proposer and seconder, and by eight other burgesses of the ward as assenting to the nomination. So any one enrolled may subscribe.

Rule 7 provides for the delivery of "every nomination paper subscribed as aforesaid."

The form of nomination paper given in the eighth Sched., Form 1, requires "signature," which is satisfied by usual signature, and the "number on burgess roll" which was given correctly. In *Gothard* v. *Clarke* (2) the number on the burgess roll was not stated, but a wrong number given.

Arbuthnot (*E. Clarke, Q.C.*, with him), for the respondents. The principle laid down in *Gothard* v. *Clarke* (2), and affirmed in *Henry* v. *Armitage* (3) by the Court of Appeal, is that the mayor is not to hold a court of inquiry, for which there is no provision in the Act, but is to compare the burgess roll and nomination paper. The mayor did so, and rightly decided that "Charles Arthur Burman" was not entitled to subscribe the nomination paper as an assenting burgess, because Charles Arthur Burman was not an enrolled burgess. By s. 9 of the Act "A person shall not be deemed a burgess for any purpose of this Act unless he is enrolled as a burgess." Apart from s. 241, it is not sufficient to be qualified as a burgess; he must be enrolled. By s. 44 the lists

(1) 1 Cr. & J. 121. (2) 5 C. P. D. 253.
(3) 12 Q. B. D. 257.

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of burgesses are to be made out in accordance with the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), which by s. 15, sub-s. 3, enacts that "each list shall state the surname and other name or names of every person whose name is inscribed therein . . . ." The addition of a second christian name would lead to a presumption that "Charles Arthur Burman" was the son of "Charles Burman."

Secondly, s. 241 does not apply. The findings of the case are in favour of the respondents. It is found only that Charles Arthur Burman was duly qualified to be enrolled and was intended to be enrolled, not that he was enrolled. He was not enrolled. No doubt a mere contraction of a name, as in *Henry* v. *Armitage* (1) where "Wm." was substituted for "William," might be correct, or even the accidental omission of a letter, as, for instance, if "Jones" were written "Jone," as Grove, J., suggested in *Gothard* v. *Clarke* (2), "obviously a mere clerical error ex facie;" but here the name of Charles Arthur Burman is not on the roll, and this is no mere "misnomer or inaccurate description" within the meaning of s. 241. It is immaterial to say that nobody has been misled. And par. 8 of the case does not even go so far. It alleges only that by "any one acquainted with Charles Arthur Burman the description in the roll would be commonly understood" to refer to him. "Commonly understood" in s. 241 does not mean commonly understood by the man's acquaintances, the section does not use the words "commonly known," but means easily understood by comparing the nomination paper with the roll.

Sir F. Herschell, S.G. In *Reg.* v. *Thwaites* (3) the christian name "James" was inserted on the burgess roll instead of "Joseph," the true name of the voter, and the Court held that the misnomer was cured by the Municipal Corporations Act, 5 & 6 Wm. 4, c. 76, s. 142, from which the words "such as to be commonly understood" are evidently taken. In *Hinton* v. *Hinton* (4) which turned on 6 Vict. c. 18, s. 101, providing that no misnomer of any person should prevent the operation of the Act provided the

(1) 12 Q. B. D. 257.
(2) 5 C. P. D. 253, at p. 261.
(3) 1 E. & B. 704; 22 L. J. (Q.B.) 238.
(4) 14 L. J. (C.P.) 58.

person named should be so denominated "as to be commonly understood," an objector named W. Nicholas appeared in the list of voters as "W. Nickless," a revising barrister decided that the objector was sufficiently described, and the Court held that the only question was whether he was so denominated as to be commonly understood, which was a question of fact for the barrister.

There never is any practical difficulty in dealing with such cases. Mayors are constantly doing so without any inconvenience.

Arbuthnot, being asked to comment on the last cases cited, replied. *Reg.* v. *Thwaites* (1) was the converse case to the present one. The burgess signed the voting paper with the name on the burgess roll, although it was incorrect. The question was as to his being entitled to vote, and the same principles do not apply. In *Hinton* v. *Hinton* (2) "Nickless," almost idem sonans as "Nicholas" in vulgar speech, was a mere error in spelling, and on comparison it would easily be seen that the one was intended for the other. That is but an instance of such a mistake as the legislature meant to be cured.

Cur. adv. vult.

1885. May 22. The judgment of the Court (Grove and Lopes, JJ.) was given by

LOPES, J. We are of opinion the mayor was right, in the circumstances mentioned in the special case, in allowing the objections to the respective nominations of the petitioners.

The ground of objection to the nominations of the petitioners, was that one of the assentors, Charles Arthur Burman, was not upon the burgess roll, and was therefore ineligible to subscribe to such nominations.

Charles Arthur Burman was so described, and of 467 Dukinfield Ward Polling District, in the respective nomination papers.

The following is the entry in the burgess roll:—

M. 466.	Burman, Joseph, 61 Caroline Street	House (joint) 61 Caroline Street.
M. 467.	Burman, Charles, 61 Caroline Street	House (joint) 61 Caroline Street.

It is convenient first to consider the case independently of s. 241 of the Municipal Corporations Act, 1882. Has there been

(1) 1 E. & B. 704; 22 L. J. (Q.B.) 238. (2) 14 L. J. (C.P.) 58.

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a sufficient compliance with the form? It has been held that the form is mandatory and not directory: *Henry* v. *Armitage*. (1) The reason why the form is to be complied with, is that a person who sees the nomination paper may be able to decide whether the candidate is properly nominated and assented to by enrolled burgesses, and to determine this by a mere comparison of the nomination papers and burgess roll without any further and laborious inquiry.

Could this be done in the present case? We think not. No person by merely comparing the nomination paper and burgess roll could tell that Charles Arthur Burman and Charles Burman were the same persons.

It is true the number 467 is the same in the nomination paper and burgess roll, but this does not assist a person who has before him nothing but the nomination paper and burgess roll. There is no reason, so far as appeared in the nomination papers and roll, why Charles Arthur Burman and Charles Burman should not be different individuals, for instance, one the father and the other the son.

But it is said the defect may be cured by s. 241 of 45 & 46 Vict. c. 50, which is as follows: "No misnomer or inaccurate description of any person, body corporate, or place named in any schedule to the Municipal Corporations Act, 1835, or in any roll, list, notice or voting paper required by this Act, shall hinder the full operation of this Act with respect to that person, body corporate, or place, provided the description of that person, body corporate, or place be such as to be *commonly understood*."

The case finds:—

"There was no other person of the name of Charles Burman or Charles Arthur Burman residing at the said address or elsewhere in the said ward. The said Charles Arthur Burman and his brother the said Joseph Burman were at the time of the last revision and of the said election the only persons of the name of Burman residing in the said ward or in the said borough of Stalybridge, and in the occupation of any qualifying property therein. Charles Arthur Burman was generally known to his friends as Charles Burman, and the name Charles Burman and the description in the said roll would by any one *acquainted with*

(1) 12 Q. B. D. 257.

Charles Arthur Burman have been commonly understood to refer to the said Charles Arthur Burman and to no other person. Any one who did not know the said Charles Arthur Burman, but who had inquired for him by the name of Charles Burman and the description in the said roll, or by the name of Charles Burman alone, would have been directed to the said Charles Arthur Burman and to no one else. There was no doubt of the identity of Charles Arthur Burman who subscribed the said nomination papers with the Charles Burman whose name appeared in the said roll."

We do not think this provision applies to a case like the present. We think "commonly understood" means commonly understood by any person comparing the nomination paper and the burgess roll. The abbreviations Frank for Francis, Fred for Frederick, Harry for Henry, Joe for Joseph would be covered by this provision, because everybody of ordinary sense would understand that was what was meant, and this upon a mere comparison of the nomination paper and burgess roll without going further.

Can it be said that Charles Burman is so commonly understood to be Charles Arthur Burman that no person would be misled, and that a mere comparison of the nomination paper and burgess roll would prove this without a further inquiry? We think not. If not, the mayor in every case where an objection like the present was taken, would have to hear evidence and decide how far the inaccuracy was likely to mislead or had misled, and whether a person was commonly known by a name other than that by which he was described in a nomination paper. Such a proceeding, it was said in *Gothard* v. *Clarke* (1), never could have been contemplated, and the inconvenience of it is too obvious for argument.

We think the petitions respectively should be dismissed with costs.

Petitions dismissed with costs.

Solicitors for the petitioners: *Sharpe, Parkers, Pritchard & Sharpe.*

Solicitors for the respondent: *Shaw & Tremellen.*

(1) 5 C. P. D. 253.

J. R.

1884
Oct. 31.

[IN THE COURT OF APPEAL.]

JOSEPH *v.* LYONS.

Bill of Sale—Assignment of future-acquired Chattels—Prior Equitable Estate—Subsequent Legal Estate without Notice—Supreme Court of Judicature Acts, 1873, 1875 (36 & 37 *Vict. c.* 66; 38 & 39 *Vict. c.* 77).

The Supreme Court of Judicature Acts, 1873, 1875, have not abolished the distinction between legal and equitable interests, they merely enable the High Court to administer legal and equitable remedies; and therefore notwithstanding these statutes, the grant of future-acquired chattels confers only an equitable interest therein upon the grantee; and if when they come into existence, but before the grantee takes possession thereof, the legal estate and interest therein, without notice of the grantee's existing equitable interest, become vested in another person, the latter is entitled to the future-acquired chattels comprised in the grant, and becomes the owner thereof, both at law and in equity.

By a bill of sale a jeweller, for a valuable consideration, assigned to the plaintiff his after-acquired stock-in-trade subject to a proviso for redemption: before the plaintiff took possession of the after-acquired stock-in-trade, the jeweller pledged a portion of it with the defendant, who had no notice of the plaintiff's bill of sale:—

Held, that the defendant was entitled to retain the stock-in-trade pledged with him as against the plaintiff, and that no action of detinue or conversion would lie.

ACTION for the detention of the plaintiff's goods.

The cause came on for trial before Huddleston, B., when the following facts were proved:—

Before the year 1866 H. Manning and Frederic Manning had carried on business at Worcester as jewellers: in that year they failed. Nevertheless, in the same year, Frederic Manning again started in business and carried it on until 1871, when he again failed, and filed a petition for the liquidation of his affairs. The plaintiff's firm were then creditors; but a composition having been offered, they guaranteed its payment. At that time they took a bill of sale over F. Manning's stock-in-trade and effects by way of security. Manning carried on the business until 1876, when he again became indebted to a large amount, which the plaintiff's firm paid off: the firm then took to the business, stock-in-trade, and effects, and Manning was engaged by them to manage the business at a salary. The plaintiff's firm then carried

on the business as "Manning & Co.," with Manning as manager, till 1881, when the business, stock-in-trade, &c., was repurchased from them by Manning for 5049*l.* 7*s.* 11*d.* The repurchase by Manning from the plaintiff's firm was upon credit, and to secure the amounts to become due, Manning executed a bill of sale in favour of the plaintiff. The bill of sale was dated the 3rd of February, 1881, and F. Manning thereby assigned unto the plaintiff "All and singular the goodwill and interest of him, the said Frederic Manning, in the business of a goldsmith, silversmith, and jeweller, carried on by him at 64 High Street, Worcester, aforesaid: and also all and singular the stock-in-trade, fixtures and fittings, plate, china, linen, chattels, and other effects and things, on or about or belonging to the said shop, dwelling-house, and premises, being No. 64 High Street, aforesaid: and also all the stock-in-trade, trade fixtures, and fittings, goods, chattels, and effects, which shall or may at any time or times during the continuance of this security be brought into the aforesaid shop, messuage, or dwelling-house, and premises, or be appropriated to the use thereof, either in addition to, or in substitution for, the stock-in-trade, trade fixtures, and fittings, goods, chattels, and effects, now being therein, or belonging thereto, or any of them," subject to a proviso for redemption afterwards contained in the bill of sale. It appears that Manning had pledged goods whilst the bill of sale of 1871 was in force, and that the plaintiff became aware of these transactions in 1876. The plaintiff having been informed that Manning was misconducting himself and was pledging the stock-in-trade, seized under the bill of sale upon the 24th of October, 1883, and it was then discovered that Manning had pledged goods with the defendant on the 17th of September, 1883, to secure an advance of 70*l.* The goods pledged consisted of jewellery of the value of 171*l.* 10*s.*, and they all had been acquired by Manning after the execution of the bill of sale of the 3rd of February, 1881. The defendant was a pawnbroker, and the pledging was effected by him in the ordinary course of his business. At the time of the pledging by Manning the defendant had no notice of the bill of sale of the 3rd of February, 1881, and he first became aware of its existence about the beginning of November, 1883. The plaintiff demanded from the defendant

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the return of the jewellery pledged by Manning, but the defendant claimed to retain it as a security for his advance.

Huddleston, B., gave judgment for the plaintiff for the sum of 171*l.* 10*s.*, to be reduced to one shilling if the jewellery should be returned to the plaintiff.

The defendant appealed.

Jelf, Q.C., and *W. H. Clay*, for the defendant. First, conversion and detinue will not lie upon the facts before the Court: *Lunn* v. *Thornton*. (1) The present case is distinguishable from *Holroyd* v. *Marshall* (2), for the defendant by the pledge to him had acquired a legal title for a valuable consideration without notice of the plaintiff's equitable title. *Clements* v. *Matthews* (3) is not against the defendant.

Secondly, the transaction between the defendant and Manning is protected by the Factors Act (5 & 6 Vict. c. 39). Manning may not be a factor in the ordinary sense of the word; but he is an agent for sale within the meaning of the statute.

[LINDLEY, L.J. How can a mortgagor of chattels to be sold in the course of a trade be the agent of the mortgagee?]

Manning was an agent for sale for the benefit of the plaintiff.

[PER CURIAM. The second point which is now urged before us, cannot be sustained.]

Thirdly, it would be against good faith to allow the plaintiff to maintain this action: he stood by and permitted Manning to act dishonestly: he was aware of Manning's character, and he knew that Manning had at one time ruined his business by pledging his stock-in-trade.

[PER CURIAM. This third point also is unsustainable.]

The defendant will not further rely upon the third point.

A. T. Lawrence, and *Darling*, for the plaintiff, were directed to confine their argument to the first point urged by the defendant's counsel. The plaintiff had a valid equitable title to the after-acquired goods, and as the Supreme Court of Judicature Acts, 1873, 1875, have abolished the distinction between legal and equitable interests, he had also a valid legal title. Manning had

(1) 1 C. B. 379. (2) 10 H. L. C. 191.
(3) 11 Q. B. D. 808.

entered into a contract to assign his future-acquired stock-in-trade to the plaintiff; when he obtained that stock-in-trade, it became subject to the provisions of the bill of sale in favour of the plaintiff, and the effect of the contract to assign was to produce a valid assignment at law: *Collyer* v. *Isaacs*. (1) At all events the after-acquired goods were appropriated to the use of the plaintiff when they were brought upon Manning's premises, and the property in them then passed to the plaintiff by reason of the appropriation pursuant to the contract between him and Manning. Possibly, no authority can be found which is exactly in point for the facts now before the Court; but *Reeves* v. *Barlow* (2) is an analogous case. The possession of Manning was determined so soon as he pledged the jewellery with the defendant, and the plaintiff became entitled to maintain against the defendant an action of detinue or trover: *Cooper* v. *Willomatt* (3). Moreover, if the plaintiff's title was only equitable, it is better than the defendant's. In any point of view the plaintiff had a lien for money advanced; and in equity the defendant cannot be deemed to be a bonâ fide holder for value, for, inasmuch as he might have searched the register of bills of sale, he had constructive notice of the plaintiff's security.

Jelf, Q.C., was not called upon to reply.

BRETT, M.R. The plaintiff has brought an action against a pawnbroker to recover jewellery: the action may be considered to be either in trover or detinue. The plaintiff's interest is under a bill of sale, of which the grantor was one Frederic Manning. The jewellery was pledged by Manning with the defendant; but the pledging was done in the ordinary course of the defendant's business. The claim is made by the plaintiff under the bill of sale against the defendant, who refuses to deliver up the jewellery unless a sum of 70*l.* advanced by him to Manning is paid. There is therefore sufficient evidence of a conversion, if the plaintiff can on other grounds maintain the action. The business was Manning's, and the jewellery pledged was part of his stock-in-trade. The bill of sale passed to the plaintiff the property in the

(1) 19 Ch. D. 342, at p. 351.
(2) 12 Q. B. D. 436.
(3) 1 C. B. 672.

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Brett, M.R.

goods which were then on Manning's premises, but it did not pass the business: the plaintiff left the goods to be dealt with by Manning in the ordinary course of his business. The bill of sale assumed to assign the after-acquired property, namely, that which was not part of his stock-in-trade at the time when it was executed: the after-acquired property necessarily became his for the first time after the bill of sale was executed. It has been argued for the plaintiff that goods purchased or acquired by Manning subsequently to the bill of sale became the plaintiff's, so soon as they came on the premises of Manning: for the defendant it has been contended that they never became the plaintiff's. It has been argued for the plaintiff that the bill of sale must be construed like a contract as to future goods, the property in which passes to the vendee so soon as they are appropriated to his use. The law has been clearly ascertained, and is binding upon us, and it has been held for many years in a long series of decisions that an assignment of after-acquired goods does not pass the property in them when they come upon the premises; and in equity it has been held that only an interest and not the property in the goods passed. The reason was perhaps that the deed assumed to pass the property at the time when it was executed, although this in point of fact could not be done; and in equity it is clear that only an interest was created by the assignment. But the parties to deeds of this nature have gone on using a form of instrument which has received a judicial construction: they have gone on using it with a notification that it will not pass the property. Is it reasonable to suppose that there was a contract at law that the goods should belong to the grantee? I think not: that is the interpretation of the deed at law. In equity, no doubt, a different construction was given to the deed; it was considered a contract in equity that when the goods should come into possession they should belong to the grantee. Notwithstanding the argument urged by the plaintiff's counsel, I think that the language of Jessel, M.R., in *Collyer* v. *Isaacs* (1) is plain enough: we are not allowed to read his judgment so as to make it ungrammatical. The property could not be assigned at law; it could be assigned only in equity: it is plain that Jessel, M.R., considered the whole transaction as

(1) 19 Ch. D. 342, at p. 351.

governed only by equitable principles, and therefore that he was alluding only to an assignment of an equitable interest. Where, then, was the legal interest in the jewellery? It is plain that it was in Manning; and he pledged the jewellery with the defendant. He thereby transferred to the defendant a legal and not merely an equitable right: the plaintiff has only an equitable interest, and the defendant has a legal interest. The plaintiff cannot maintain a legal remedy like conversion or detinue.

Two other points urged before us may be briefly disposed of. It is said that Manning was an agent within the Factors Acts: the answer is that the Factors Acts relate to one who sells for a principal: that is not the case here: Manning was to sell on his own account, but for the purpose of paying off his debt to the plaintiff. The other point was that the plaintiff had wilfully shut his eyes to the proceedings of Manning, but he made no representation to the defendant, who cannot in this respect complain of the plaintiff's conduct. The plaintiff fails before us, because the defendant has the superior right at law. We must differ from Huddleston, B.; probably before him the case was not argued as it has been before us.

COTTON, L.J. The plaintiff sues for goods which, he alleges, have been converted or detained from him by the defendant. The bill of sale to the plaintiff purports to assign the after-acquired stock-in-trade. The first question is whether the plaintiff has acquired any property in that stock-in-trade. In *Holroyd* v. *Marshall* (1) it was held, with some doubt on the part of some of the Law Lords, that when future-acquired property is assigned, pursuant to a contract capable of specific performance, that property, when it has been sufficiently ear-marked and identified, may pass to the assignee and become his property; it may be that there was not a valid assignment at law, but where there was a valuable consideration, the assignment might be valid in equity. The law stood in this position before the Supreme Court of Judicature Acts, 1873, 1875. It has been argued before us that the difference between legal and equitable interests has been swept

(1) 10 H. L. C. 191.

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away by those statutes. But it was not intended by the legislature, and it has not been said, that legal and equitable rights should be treated as identical, but that the Courts should administer both legal and equitable principles. I think that the clause enacting that the rules of equity shall prevail (Supreme Court of Judicature Act, 1873, s. 25, sub-s. 11) shews that it was not intended to sweep away altogether the principles of the common law. And it was not intended that a conveyance void at common law should, after the passing of those statutes, become valid as a conveyance at common law. I repeat what I said in *Clements* v. *Matthews*. (1) I think that this bill of sale, although it was a deed, gave no legal title. Then reliance was placed upon a contract that the after-acquired property should belong to the plaintiff: it was the rule at common law that the property in future-acquired goods should not pass, except, perhaps, where there was a contract that the property in them should pass: that rule still remains in force; and it follows that the legal title remains as it stood at law; only an interest in equity passed to the plaintiff. Then the defendant had the legal title: he had no notice of the equitable title existing in the plaintiff: at least nothing has been proved shewing that he had notice: here the defendant was a pawnbroker, and he was not bound to search the register of bills of sale: he was not bound to inquire as to goods pledged with him in the course of his business. Of course, if he had been informed of the existence of the bill of sale, he would have been bound to search the register in order to inform himself of its contents; but I think that the doctrine as to constructive notice has gone too far, and I shall not extend it. The appeal is successful, and must be allowed.

Huddleston, B., appears to have relied upon the decision of Lopes, J., in *Lazarus* v. *Andrade* (2): I think that the decision in that case was right; but I cannot agree with what I gather to have been the view of the learned judge as to the effect of the Supreme Court of Judicature Acts, 1873, 1875. I do not think that they have abolished the distinction between legal and equitable principles.

(1) 11 Q. B. D. 808, at p. 814.

(2) 5 C. P. D. 318.

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LINDLEY, L.J. I also think that the defendant is entitled to recover in the present action. The plaintiff claims the goods: in order to entitle himself to succeed, either he must have a legal title, or if he had only an equitable title he must shew that the defendant had notice of that title. The clauses of the deed, and the mode in which it is framed, shew that the plaintiff knew that it would not pass the property in the after-acquired goods: that is plain upon the face of the deed. Reliance was placed upon the provisions of the Supreme Court of Judicature Acts, 1873, 1875, and it was contended that the effect of them was to abolish the distinction between law and equity. Certainly that is not the effect of those statutes: otherwise they would abolish the distinction between trustee and cestui que trust. In the present case, the defendant has the legal title, and he has not had either express or even constructive notice of the plaintiff's equitable title. It seems to me that the modern doctrine as to constructive notice has been pushed too far, and I do not feel inclined to extend it. This appeal must be allowed.

Judgment for the defendant.

Solicitors for plaintiff: *C. C. Ellis Munday & Co., for William Lambert, Great Malvern.*

Solicitor for defendant: *D. W. Pearse, for Jeffery Parr, Birmingham.*

J. E. H.

1885
Feb. 26.

[IN THE COURT OF APPEAL.]

HALLAS *v.* ROBINSON.

Bill of Sale—After-acquired Property—Subsequent Bill of Sale—Grant of Legal Interest—Seizure by Owner of Equitable Interest.

By a bill of sale executed in 1875, R. granted to M. the after-acquired chattels which should be upon certain premises of R. The title of M. under the bill of sale ultimately vested in the defendant. R. brought upon the premises chattels acquired by him after 1875, and before the coming into operation of the Bills of Sale Act, 1882, by a bill of sale granted to the plaintiff these after-acquired chattels. The plaintiff had no notice of the bill of sale in favour of M. In January, 1884, the defendant seized the after-acquired chattels then upon the premises of R. The plaintiff demanded possession of them from the defendant, who refused to give them up; and the plaintiff thereupon brought an action to recover their value:—

Held, that the plaintiff was entitled to recover from the defendant the value of the goods in question; for the grant of the after-acquired chattels to M. carried only an equitable interest, while the plaintiff by the grant to him took the legal interest without notice of the prior equitable interest vested in M. and had a better title than the defendant.

Joseph v. *Lyons* (ante, p. 280) followed.

ACTION for conversion and detention of the plaintiff's goods and chattels.

The cause came on for trial at the Spring Assizes for Yorkshire, 1884, held at Leeds before Butt, J., and the following appear to be the material facts of the case:—

Joseph Robinson was a cab proprietor, of Hunslet, in the parish of Leeds, and by a bill of sale dated the 21st of September, 1875, after reciting that he was indebted to Mary Mitchell in the sum of 250*l*., he granted and assigned unto her and her executors, administrators, and assigns, "All and every the household goods and furniture, stock in trade, plate, and plated articles, household linen, books, china, and other household effects whatsoever, horses, saddles, harness and other accoutrements: and also all the implements of husbandry, corn, and grain, and live and dead stock: and also the carts, carriages, and other articles, and other effects mentioned and referred to in the schedule hereinafter written. And all other goods, chattels, and effects now being, or which shall hereafter be, in, upon, or about the messuage, or dwelling-

house and premises, occupied by the said Joseph Robinson and situate in Hardisty's Yard, Waterloo Road, in Hunslet aforesaid, and the tenements and other outbuildings and lands belonging thereto or held therewith: And all and every the book and other debts, sum and sums of money, due and owing to the said Joseph Robinson from any person or persons whomsoever: And all other the personal estate whatsoever of or to which the said Joseph Robinson is now and from time to time and at all times hereafter (so long as any moneys shall remain due and payable to the said Mary Mitchell, her executors, administrators, or assigns, by virtue of these presents), shall be possessed of or entitled to." The foregoing bill of sale was duly registered in 1875, but was never re-registered. After the execution of the bill of sale in favour of Mary Mitchell, Joseph Robinson acquired other chattels falling within the terms thereof. Subsequently he became involved in other difficulties; and in February, 1882 (and therefore before the coming into operation of the Bills of Sale Act, 1882), he assigned unto the plaintiff by a bill of sale as a security for an advance of £180, all his stock-in-trade, household furniture, carriages, horses, harness, trade-fixtures, goods upon the premises, occupied by him in Hardisty's Yard, Waterloo Road, Hunslet, near Leeds. And by a bill of sale dated the 26th of September, 1882 (and therefore made before the coming into operation of the Bills of Sale Act, 1882), Joseph Robinson further charged the property comprised in the bill of sale of the previous February by way of security for a further advance of 50*l*. These bills of sale were duly registered, and the plaintiff had no notice of the bill of sale of 1875. Mary Mitchell died in January, 1879, having by her will appointed the defendant and Harriett Perkins her executors. By an indenture dated the 25th of January, 1884, and made between Joseph Robinson of the first part, the defendant, and Harriett Perkins of the second part, and the defendant of the third part, after reciting that the sums of 223*l*. and 6*l*. 12*s*. for interest were due upon the bill of sale of the 21st of September, 1875, and that Joseph Robinson, being unable to pay the same, had with the consent of the executors, and upon the condition that the purchase-money was paid to them, agreed with the defendant to sell to him the personal estate set out in the schedule

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for the sum of 100*l.*, it was witnessed that the executors assigned, and Joseph Robinson, assigned and confirmed unto the defendant, all the personal chattels and effects in the schedule thereunder written as and for his absolute effects. The schedule contained certain carriages, horses, harness, and household furniture: nearly the whole of these chattels had been acquired by Joseph Robinson after 1875. The defendant forthwith seized and removed these goods. Joseph Robinson had repaid to the plaintiff part of the sum due by virtue of the two bills of sale executed in his favour in the year 1882; but a balance of 68*l.* remained due to the plaintiff. He requested payment of this sum, but was informed that the defendant had taken possession of the goods. On the 29th of January, 1884, and again on the 1st of February, the plaintiff demanded of the defendant the chattels seized by him; but he refused to give them up. The present action was commenced on the 6th of February.

Butt, J., on the 20th of May, ordered that judgment should be entered for the defendant.

The plaintiff appealed.

J. Forbes, Q.C., and *Robert Wallace*, for the plaintiff. This present case is really decided by *Joseph* v. *Lyons* (1), which is directly in point.

[BRETT, M.R.:—In that case it was merely decided that where a bill of sale contains an assignment of after-acquired chattels, the legal estate in chattels falling within the terms of the bill of sale does not pass to the grantee until they come upon the grantor's premises and until the grantee there takes possession of them. In the present case it is true that the defendant was only the assignee of an equitable interest, but he has taken possession of the after-acquired chattels.]

But the plaintiff by the bill of sale executed in 1882, obtained the legal estate in the after-acquired chattels long before they were seized by the defendant. Possession of the chattels was demanded from the defendant before the present action was commenced, and therefore an action of conversion or detinue is maintainable.

(1) Ante, p. 280.

Moreover, the bill of sale executed in favour of Mary Mitchell did not give a specific description of the after-acquired chattels, and therefore is insufficient: *Belding* v. *Read.* (1)

Macmorran (*H. C. Richards*, with him), for the defendant. This is a converse case to *Joseph* v. *Lyons.* (2) The defendant had a right to take possession of the chattels seized by him, and there was no evidence that at the date of the assignment to him he had notice of the bills of sale executed in favour of the plaintiff; and it was not until a subsequent time that the plaintiff demanded the chattels. Further, the description of the after-acquired chattels was sufficiently specific to pass the property in them to Mary Mitchell, when they were brought upon the premises of J. Robinson: *Lazarus* v. *Andrade* (3); *Clements* v. *Matthews.* (4)

Forbes, Q.C., in reply.

BRETT, M.R. We are not called upon to overrule any independent decision of Butt, J., because, as the authorities stood before *Joseph* v. *Lyons* (2), he might not unreasonably consider himself bound to give judgment for the defendant. It seems to me that the bill of sale in favour of Mary Mitchell was sufficiently specific; but as to the after-acquired chattels she took only an equitable interest by the assignment to her. It is true that she or the defendant who claims through her might have turned their equitable title into a legal title by taking possession of the after-acquired goods and chattels; but until they or one of them seized, J. Robinson had a right to the possession of the after-acquired chattels, and he had the legal right to them. It is true that when the after-acquired goods were brought upon Robinson's premises, the condition was fulfilled, whereupon the property passed to Mary Mitchell in equity; but Robinson had the legal title. He likewise granted in 1882 a bill of sale to the plaintiff; the goods now in dispute were then upon Robinson's premises; the defendant had only an equitable title to these goods. But Robinson, it may be fraudulently, granted a legal title to the plaintiff. That legal title cannot be ousted or displaced by the

(1) 3 H. & C. 955; 34 L. J. (Ex.) 212.

(2) Ante, p. 280.

(3) 5 C. P. D. 318.

(4) 11 Q. B. D. 808.

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equitable title of the defendant, of which the plaintiff had no notice. The defendant is in the same position as the owner of goods, who has parted with the property in them through the fraud of another person, and who finds that an innocent person has meanwhile acquired a valid legal title to them: in a case of that kind the person, upon whom the fraud has been perpetrated, must suffer the loss; and in the present case the defendant must suffer the loss occasioned by the wrongful act of Robinson. I doubt whether in the present case an action could be maintained without a demand by the plaintiff; but he having demanded the goods, the refusal of the defendant to deliver them amounted to a conversion. There must be judgment for the plaintiff.

BAGGALLAY, L.J. I am of the same opinion. This is the converse case to *Joseph* v. *Lyons* (1), but the circumstances are similar. By the bill of sale executed in 1875, J. Robinson granted to Mary Mitchell all the goods and chattels, which might thereafter be brought upon the premises: this is a grant which is null and void at law: but an equitable interest was vested in the grantee. In 1882 the same grantor executed another bill of sale in favour of the plaintiff. The goods in dispute in this action were acquired between 1875 and 1882, and the legal estate in them was granted to the plaintiff. Both the plaintiff and the defendant had equitable rights; but the plaintiff had the legal right also. Thus far the case is governed by *Joseph* v. *Lyons* (1); but then this additional circumstance arises, that when the plaintiff endeavoured to seize the chattels comprised in the bill of sale made in his favour, he found them in the possession of the defendant, who claimed them under an assignment made by the executors of Mary Mitchell. But this assignment could not defeat the legal estate which was vested in the plaintiff. There was no evidence of notice to the plaintiff. The plaintiff and the defendant are two innocent parties, each of whom has advanced money; but one of them must suffer a loss. The only distinction between this case and *Joseph* v. *Lyons* (1) does not establish any ground for holding that the two cases must be treated on different principles. Judgment must be entered for the plaintiff.

(1) Ante, p. 280.

LINDLEY, L.J. The simplest method of dealing with this case is to look first at the facts which have happened since the end of 1881. By a bill of sale executed in February, 1882, J. Robinson assigned his goods and chattels to the plaintiff; but in 1875 he had agreed to assign his after-acquired goods to Mary Mitchell, and these goods by the bill of sale of 1882 he assigned to the plaintiff. No notice of the assignment to Mary Mitchell appears to have been given to the plaintiff, and he could have recovered by action from Robinson the goods contained in the bill of sale to the plaintiff. What is there to displace the plaintiff's title? It has been contended that it is annulled by the agreement contained in the bill of sale to Mary Mitchell to assign the after-acquired goods. The defendant has acquired the title of the executors of Mary Mitchell: but he has got nothing more than an interest in equity. It is true that the defendant has taken possession of the goods, but his possession is referable to the bill of sale of 1875; and we must consider what was done in February, 1882. By the bill of sale then executed the plaintiff had a legal title conveyed to him, and that title must prevail against the defendant's equitable title.

Judgment for the plaintiff for 68*l.*

Solicitors for plaintiff: *Burn & Berridge, for Hunter & McMaster, Bradford.*

Solicitors for defendant: *Hamlin, Grammer, & Hamlin, for Pullan, Leeds.*

J. E. H.

1885
June 18.

[IN THE COURT OF APPEAL.]

KNIGHT AND OTHERS *v.* CLARKE AND OTHERS.

Ejectment—Landlord and Tenant—Holding over after Expiration of Term—Writ of Possession when Plaintiff's Title has expired.

Where a landlord has recovered judgment in an action against his tenant for the possession of premises which had been held over after the expiration of the tenancy, he will be allowed to issue the writ of possession notwithstanding that his estate in the premises terminated after the commencement of the action and before the trial, unless it be unjust and futile to issue such writ, and it is for the defendant to shew affirmatively that this will be the result of issuing such writ.

ACTION to recover possession of houses in Calvert Street, in the parish of St. George-in-the-East, Middlesex, in the possession of the defendant Clarke, or his tenants.

By indenture dated the 29th of April, 1786, the land on which the houses in question were erected, was demised by the freeholders, John Adams and others, to one John Camden and others, for the term of ninety-eight years from the 25th of March, 1786. After various assignments this lease and the residue of the unexpired term of ninety-eight years became vested in one Thomas King, who by an indenture dated the 25th of January, 1810, demised the land, houses, and premises to the predecessors in title of the defendant Clarke for the term of seventy-five years, wanting three days, from the 25th of March, 1809. By various assignments the estate and interest of the said Thomas King in the residue of the term of ninety-eight years created by the indenture of the 29th of April, 1786, became ultimately vested in the plaintiffs.

The lease of the 25th of January, 1810, of which the defendant Clarke was the assignee, expired on the 22nd of March, 1884, and possession not being given up to the plaintiffs, this action was commenced on the 24th of March, 1884. The defendant Clarke pleaded, inter alia, that if the plaintiffs were at the commencement of this action entitled to the estate of the said Thomas King in the premises, and if such estate had not determined before the service of the writ, such estate had determined since the service of the writ.

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The action was tried before Mathew, J., without a jury, at last Hilary sittings, in Middlesex, when there was evidence that a Mr. Rebow, who claimed to be entitled as the freeholder, had demanded possession after the 25th of March, 1884, when the lease of the 20th of April, 1786, had expired. The learned judge held that the plaintiffs were entitled to recover, and he accordingly gave a verdict and judgment for them, and ordered the writ of possession to issue, although it was contended for the defendant Clarke that the plaintiffs' reversion of three days having expired before the trial, the plaintiffs were not entitled to the writ of possession.

The defendant Clarke appealed.

Gully, Q.C., and *Reginald Bray* (*B. L. Mozley*, with them), for the defendant Clarke. When the lease of the 25th of January, 1810, expired, which it did on the 22nd of March, 1884, the plaintiffs had only three days' reversion, and although that right was subsisting when the writ in this action was issued, it had gone long before the trial took place, so that, assuming the plaintiffs to have established their title to the land when they brought their action, yet as such title had expired before the trial they were only entitled to have the verdict and judgment entered for them. They were not entitled to possession of the land, and therefore the learned judge ought not to have ordered the writ of possession to issue. By s. 181 of the Common Law Procedure Act, 1852, it was enacted, that in case the title of the claimant should appear to have existed as alleged in the writ, but to have expired before the time of trial, the claimant was notwithstanding "to be entitled to a verdict," "and to a judgment for his costs of suit." In the note on this section in Day's Common Law Procedure Acts, it is said, "the Court would not formerly stay proceedings in an ejectment on the ground of the claimant's title having expired; for though possession could not be obtained, yet the plaintiff had a right to proceed for damages and costs: *Thrustout* v. *Grey* (1); see also *Doe* d. *Butt* v. *Rous* (2), so that this section merely enacts what was the law." *Thrustout* v. *Grey* (1) was where the tenant for life, who was the lessor of the plaintiff, died pending

(1) 2 Str. 1056. (2) 22 L. J. (Q. B.) 111.

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the action of ejectment, and though the proceedings were not stayed it was said possession could not be obtained. So in *Doe* d. *Morgan* v. *Bluck* (1) though the rector was allowed to maintain ejectment for glebe lands after they had been sequestered under a sequestration, he was not to recover possession. No doubt the plaintiffs will rely on *Gibbins* v. *Buckland* (2), which is referred to in the note in Day's Common Law Procedure Acts on this 181st section, as a case in which the Court of Exchequer allowed a writ of possession to issue under such section, although the lease under which the plaintiff held had expired, it not being shewn that the claimant had no title at all.

[BOWEN, L.J. How in the present case is it shewn to be unjust to allow the judgment in this action to be followed by a writ of possession?]

The freeholder claimed to have possession when the plaintiffs' lease had expired, and the plaintiffs were shewn at the trial not to be entitled to possession.

[BRETT, M.R. They were entitled to possession as against this defendant.

BOWEN, L.J. It is consistent with the evidence that the plaintiffs were entitled to possession with the licence of the freeholder.]

[*Witt*, for the plaintiffs. The plaintiffs in fact are maintaining the action with the consent of the freeholder.]

The case of *Gibbins* v. *Buckland* (2) was on the 181st section of the Common Law Procedure Act, 1852, and that section has been repealed by 46 & 47 Vict. c. 49, s. 3, besides afterwards, in *Buckland* v. *Gibbins* (3), Lord Westbury, L.C., restrained the plaintiff in *Gibbins* v. *Buckland* (2) from issuing his writ of possession.

Bompas, Q.C., and *J. G. Witt* (*W. M. Spence*, with them), for the plaintiffs, were not called on.

BRETT, M.R. The case of *Gibbins* v. *Buckland* (2) is a positive authority in favour of the judgment which has been given in the present case by Mathew, J. The defendant Clarke was bound by his contract to give possession on a certain day to the plaintiffs

(1) 3 Camp. 447.

(2) 1 H. & C. 736; 32 L. J. (Ex.) 156.

(3) 32 L. J. (Ch.) 391.

of premises he held under a lease of which he was the assignee. The action is brought by the plaintiffs to recover these premises, and they shew that as against such defendant they are entitled to the possession, and that if such defendant had done what was right, he would at the end of his term have gone out of possession and the plaintiffs would then have gone in. This defendant, however, says that although on that day when the term ended and when the action was brought the plaintiffs were entitled to possession, yet that their title had expired before the trial came on, so that by the delay which had occurred in bringing the cause to trial the defendant Clarke had acquired a right against the plaintiffs which he would not otherwise have had. I am of opinion that he never acquired any right against the plaintiffs. It may be that the Court will not grant a writ of possession when as between a plaintiff and some one else it appears that that person and not the plaintiff is entitled to possession, but the case of *Gibbins* v. *Buckland* (1) shews that if that is relied on as a ground why the writ of possession should not issue, the defendant must prove affirmatively that it would be futile to issue such writ, because though the plaintiff may have a right to the possession as against the defendant—yet that in fact some one else and not the plaintiff has a right to the possession. Now has the defendant Clark proved for this purpose what according to that case he was so bound to prove. All that he proved was that Mr. Rebow asked for possession, but there is nothing in that to shew that it would be unjust or futile to give possession to the plaintiffs; for it does not shew that Mr. Rebow objects to the plaintiffs having possession. In my opinion the case of *Gibbins* v. *Buckland* (1) is a direct authority in favour of the plaintiffs, and that the learned judge was right in the judgment he gave. The defendant Clarke cannot by reason merely of the delay refuse to give the possession which he was bound to have given at the time when the plaintiffs demanded it of him.

BAGGALLAY, L.J. I am of the same opinion. Before March, 1884, the defendant Clarke was in possession of the premises in question as assignee of a lease, and the plaintiffs were entitled to

(1) 1 H. & C. 736; 32 L. J. (Ex.) 156.

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the reversion on the expiration of such lease, although it is true that such reversion was only for three days. If procedure in this country were as rapid as some persons wish it to be, and the action could be tried on the same day that the writ was issued, the plaintiffs would have been entitled not only to the verdict, but to have had possession of the premises. Proceedings cannot, however, be so rapid as that, and by reason of the delay the three days' reversion expired before the trial took place. The defendant Clarke shewed that some one claimed as the freeholder the right to the possession, and he might have shewn that the plaintiffs had no right whatever to the possession, but he did not do so, and the case of *Gibbins* v. *Buckland* (1) shews that unless there be evidence that the plaintiff who has recovered in such an action as this has no title whatever, he is entitled to have possession given to him. In *Doe* d. *Morgan* v. *Bluck* (2), which was ejectment by a rector against a tenant of his glebe land, it was shewn that at the time of the trial the right to the possession was in a different party from the plaintiff, namely in the sequestrator of the living. So in *Buckland* v. *Gibbins* (3), which was a case in which the defendant in *Gibbins* v. *Buckland* (1) filed a bill in Chancery and applied for an injunction to restrain the plaintiff in the action of ejectment from issuing a writ of possession, Lord Westbury granted such injunction, it appearing from evidence which was not before the Court of Exchequer in the common law action of *Gibbins* v. *Buckland* (1) that there was an agreement between the defendant Buckland and the freeholders for a new lease of the premises, which shewed that the plaintiff in that action had no title to the possession.

BOWEN, L.J. I also am of opinion that the judgment of Mathew, J., was right. The plaintiffs obtained a judgment in an action to recover the possession of certain premises, and the question is whether the writ of possession should issue in conformity with the judgment. That writ is intended to forward justice, and the Court will not grant it where the result of granting it will be to defeat justice. If, as pointed out by the Master of the Rolls,

(1) 1 H. & C. 736; 32 L. J. (Ex.) 156. (2) 3 Camp. 447.
(3) 32 L. J. (Ch.) 391.

the possession, the right to which as between the plaintiff and defendant is in the plaintiff, has so passed in fact or law to another, that that other and not the plaintiff is entitled to it, the Court will not take it away from him and give it to the plaintiff; but then the onus lies on the defendant to satisfy the Court that such is the case, and that justice would be defeated by allowing the writ to issue. In the present case, so far from that, both justice and law are in favour of the plaintiffs, for it is clear that the real object of the defendant Clarke is to take advantage of his own wrong in not having given possession when he ought to have done so. The plaintiffs cannot by the mere verdict and judgment for the mesne profits have compensation for the defendant's wrongfully withholding possession when he ought to have given it, for had he gone out then, the plaintiffs would have had the advantage of being in possession at the expiration of the lease. However, I believe the plaintiffs are really asserting the right of the freeholder.

Appeal dismissed.

Solicitors for plaintiffs: *Knight & Co.*

Solicitors for defendant Clarke: *Beard & Sons.*

W. P.

1884
Dec. 13.

[IN THE COURT OF APPEAL.]

LIMPUS AND ANOTHER *v.* ARNOLD.

Will, Construction of—Advancement by Parent to Child—Debt due to Testator, whether released by Will—Bequest of Residue on Trust to pay Income to Widow, and subject thereto for equal Distribution among Children—Clause providing that Advances made to Children shall be brought into Hotchpot.

A testator had advanced by way of loan to the defendant, one of his children, a sum of 2000*l.*, upon which sum interest was paid during the testator's lifetime. The testator by his will, devised and bequeathed his property, both real and personal, to trustees on trust to permit his widow to receive the income actually produced by such property, however constituted or invested, during widowhood, and subject thereto on trust for his child, if only one, or all his children equally if more than one, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry. The will contained a proviso that any advances made by the testator to any child or to the husband of any child in his lifetime, together with interest on such advances, as charged against such child or her husband in his private memorandum book in his own handwriting, should, according to the amount thereof, be taken in full or in part satisfaction of his or her share in the testator's property, unless the testator should otherwise declare by writing under his hand. The sum advanced to the defendant was charged against him in the testator's memorandum book, and such book contained an entry as follows: "This is the memorandum book named in my will as containing the advances made by me to my children or their husbands to be taken in satisfaction of their respective shares in my estate":—

Held, by Brett, M.R., and Lindley, L.J., Cotton, L.J. dissenting, that the testator's widow was entitled to receive from the defendant during her life, as part of the annual income given to her by the will, interest on the said sum of 2000*l.*

Judgment of the Queen's Bench Division (13 Q. B. D. 246) affirmed.

APPEAL by the defendant from the judgment of the Queen's Bench Division in favour of the plaintiffs.

The facts of the case are fully stated in the report of the proceedings before the Queen's Bench Division (1), and also may be gathered from the above head-note. It is only necessary to add here that the defendant, Robert William Arnold, was one of the executors and trustees of his father's will, and that he had as executor proved it. The testator himself was a miller by trade.

H. A. Giffard, Q.C., (*Warr* with him), for the defendant. The

(1) 13 Q. B. D. 246.

action is not sustainable: the testator appointed the defendant one of his executors, and therefore if the advance to the defendant is to be treated as a debt, it was extinguished at the death of the testator. Under ordinary circumstances amounts due on promissory notes are not advances to be brought into hotchpot: *Auster* v. *Powell* (1), and in the present case the advances to the defendant and H. Jackson were to be brought into hotchpot only for the purpose of equalising the children's shares amongst themselves. These advances must be treated as gifts upon the testator's death. The testator's widow is not entitled to any benefit by reason of the hotchpot clause: *Meinertzagen* v. *Walters* (2); *Stewart* v. *Stewart.* (3)

[BRETT, M.R. In *Meinertzagen* v. *Walters* (2) the contention of the appellant (the testator's widow) was outrageous, as was pointed out by James, L.J.: in *Stewart* v. *Stewart* (3) it does not appear that the will contained any provision equivalent to the bequest to the widow in the present case.]

As regards the hotchpot clause, the period of the widow's life is not to be taken into account: *Rees* v. *George.* (4)

A. M. Channell, for the plaintiffs. The sum of 2000*l.* lent to the defendant was a debt forming part of the testator's estate: it does not resemble a gift by a parent to a child. Until the death of the testator's widow it did not become an advancement within the meaning of the hotchpot clause. The present case is distinguishable from those cited on behalf of the defendant; the doctrine as to advancements has no application to the present case. The testator intended that the loan of 2000*l.* to the defendant should continue to be a debt until the death of the testator's widow: it was not to be deemed to be a gift to the defendant until that time.

As to the point raised by the defendant's counsel that the debt was extinguished by the appointment of the defendant as executor, it is to be recollected that in equity a debt is still recoverable even although the debtor is appointed an executor: 2 Williams on Executors, part 3, book 3, c. 2, s. 9, p. 1320 [8th ed.]

Warr, in reply.

(1) 1 D. J. & S. 99.
(2) Law Rep. 7 Ch. 670.
(3) 15 Ch. D. 539.
(4) 17 Ch. D. 701.

1884

LIMPUS v. ARNOLD.

BRETT, M.R. This is a will which, it will be found, causes difference of opinion, but I must give my opinion about it. The first rule that I lay down for myself, I believe is in strict accordance with the opinion of the late Master of the Rolls, and is this: that the first thing to be done when I have a will laid before me, and I am called upon to construe it, is to look at that will, and if I find what I believe to be a clear enunciation of the testator's intentions, then upon that will I say that none of the technical rules of construction have anything to do with it; in that case it is unlike other wills. The first thing which I look at is the will itself. I think I can see clearly that the position of things with regard to this testator when he made his will was, that having a wife who would become his widow, and having children, he meant to do that which under such circumstances to my mind is the most natural and proper thing that a man can do, to leave the income of his property to his wife for her life, and to then divide it equally amongst his children at her death. Now that seems to me to have been the plain governing principle upon which this testator intended to act, the natural principle, and this is the will which one would have expected him to make. Let us see how he proceeded to carry out his intention. In some parts of the will he proceeded to do it as badly as usual, and of course under those circumstances, as badly as usual means as badly as possible. Now what had he to deal with, subject to these intentions? It appears that he was a miller; he would have personal property of a great many different kinds, and it certainly appears that he had some, or thought he would have some, invested in stocks, funds, and securities yielding income. Now it appears that at the time when he made this will he had lent one of his sons 2000*l*. He had lent it to him in a business-like way, not lending it to him without the son being bound to pay interest, but he had lent it to him on the terms that the son should pay him 5 per cent. on it. Now, first of all, that was a debt and a loan on those terms, whether a promissory note had been given or not; a debt was due on those terms. At that time, of course, it was not a gift, it was a mere debt. Then he had that secured by a promissory note on the same terms as the terms of the debt. To my mind a person in his position having a debt due to him,

and having a promissory note, always considers that promissory note as if it is something more than a mere debt, and he calls it a security. Therefore, what he had was money invested in different securities, money not invested at all, and money lent to his son, secured as he would call it by a promissory note.

Now the first thing, therefore, is, that he is dealing with such property as that. "I direct that my trustees shall convert my personal trust property"—"shall convert," that is, shall collect and get in, and if any of it is personal property that wants selling, sell it so as to make it all into money—he goes on to take out of it that which did not want selling, and did not want converting, "not consisting of moneys invested in stocks, funds, or securities yielding income." The "securities" there are securities of the same kind as stocks and funds; they might be railway bonds or other investments, securities yielding income. Therefore, all the property which wanted converting was to be converted, and all the property which did not want converting was not to be converted. Now he puts in, in the most awkward way that ever was, "other than personal securities." "Other than personal securities" cannot be a part of moneys invested in stocks, funds, or similar securities yielding income: they are not personal securities. Therefore those words, "other than personal securities" are again exceptions from the personal property which is to be converted. I take it to be perfectly clear, in my mind I am as convinced as if I sat at his elbow and heard him say it, that either at the time this was read over to him, or when it was being written, having excepted out the stocks, funds, or securities yielding income which are ordinary investments, then he thought of this very thing, that is, the promissory note given to him by his son, and he meant that that should not be converted or got in, that is, that his son should not be sued for it. To say that his son shall not be sued for it might, in one sense if anything happened, lead one to suppose that he meant to forgive him. That might be so: "and shall at their discretion," it goes on, "either get in the moneys invested as last aforesaid or permit the same to continue so invested." Now what does that apply to, "as last aforesaid?" That seems to apply to those more regular investments, and the truth is, that those words, "other than personal securi-

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ties," seem to my mind to be put in as they are for the very purpose of carrying them up again before those other words, "invested in stocks, funds, or securities yielding income." Then that will make the next sentence, or the next part of that sentence, appliable to those moneys which are invested in stocks, funds, or securities yielding income. At their discretion, they being the last-mentioned in that sense, the trustees may alter those investments.

Now having so directed his trustees to deal with his personal property, for his personal property is part of his trust property, he is going to say for whose benefit they shall hold it. Now he comes to that which is the first governing principle of his whole will: "I direct that my trustees shall permit my wife, she continuing my widow, to receive from my death the net annual income actually produced by my trust property, howsoever constituted or invested." Now this debt from his son was part of his personal property, constituted in the way in which it was by his having lent it to his son on a contract to pay 5 per cent. interest. Therefore, it seems to me he could not say in more plain terms that he intended the interest on this debt, as well as the interest on every other investment, even of property which was to be converted, and which was not paying interest at all, but which if it were converted would pay interest, and including this debt, which was so constituted that interest was being paid upon it, to come within the very words that interest was to be paid to his wife for her life.

I come to his next governing principle: "Provided always, and I declare, that any advance made by me to any child or to the husband of any child in my lifetime, together with interest on such advances from the time of making thereof, as charged against such child or her husband in my private memorandum book in my own handwriting, shall, according to the amount thereof, be taken in full or in part satisfaction of his or her share in my trust property." Now the other parts of the will shew that his property is to be divided amongst his children. But when? After his wife's death. It seems to me that unless there is some rule to the contrary, the testator's intention was plain enough: first of all, he was willing, at this time, that that which had been

a debt bearing interest payable to him, should be treated as an advance. This clause was wanted to make that which otherwise would be a debt to be paid and recovered, an advance, and it ought to be treated as an advance. Well, it is not a debt—all the interest due upon it is to be treated in a particular way; because, if there was interest due which he had not put down in his private memorandum book in his own handwriting as charged against his children, it does not come within it. But what he meant to do was this: "I put down the debt which is due to me in my pocket book; if he pays me so much I shall, of course, not put it down then at all, or put it down in a particular way. If I think he is in arrear as to any interest which he ought to have paid to me, I shall put that down and charge it against him, and now, when the money comes to be divided between him and his brothers and sisters, the governing idea in my mind being that they shall be equal, if he is to be forgiven that debt and to have an equal share with all the others, he will get a great deal more than his brothers and sisters. Therefore I say that in counting what each of them is to have, he is to be counted as having got this now, it is to be put down to his share." So it is brought in. To my mind, it is absolutely clear, beyond all doubt, that was the intention. That is my construction of this will by itself. Then it is said that there are rules of equity, or rules of construction, which have been laid down by learned judges, which shew that that cannot be, that the testator did not mean that, or that if he did mean that, his intention must be overruled. Cases have been cited, but there is not one of them in point. There is not one of them that has this clear clause in favour of the wife, the interest on the whole of the property being paid to her during her life. It was admitted that if it had in the very plainest terms said that it meant the interest on everything, including this, to be paid to his wife, there is no case which could overrule that manifest intention. If I come, therefore, to a clear opinion that this will has clearly pointed out what was the intention of the testator, there is no case which says that that plain intention is to be overruled upon such a will as this.

I think, therefore, that, both upon the true construction of this will and upon the view that there is no authority obliging me to

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come to a conclusion opposite to that which appears to me to be the plain view, in my opinion the decision of the Divisional Court was right, and this proviso was only to be applicable at the time when the wife died.

COTTON, L.J. Certainly this will is not easy of construction, but it has led to a very interesting legal discussion. The question is, What is the true construction of the will? I quite agree with this, that hardly any case can help us in determining what is the true construction of a different will. But then cases may be important when we have ascertained what the true construction is, to see what is the result, and that is the only use, I think, in this case of which any cases can be.

Now the clause relied upon by the appellant is this: "Provided always and I declare that any advances made by me to any child or to the husband of any child in my lifetime, together with interest on such advances from the time of making thereof, as charged against such child or her husband in my private memorandum book in my own handwriting, shall, according to the amount thereof, be taken in full or in part satisfaction of his or her share in my trust property, unless I shall otherwise declare by writing under my hand." Now we must remember what the facts were. The sum which he had given to his son was not a portion given to him, not an advancement by way of gift; it was a debt due to him by his son for a loan made before the date of the will. But there is this, that although as between those entitled to the residue after the death of the widow it would have been taken into account, all the residuary legatees being children, yet as regards the widow it would not have been taken into account, and she would have got no benefit from the necessity of this son's bringing into account in the distribution the sum which had been given to him. We must remember this, that if this was a debt, of course the son, until he paid that debt and made good that debt, could not have received any portion of his share of residue. What is the meaning of this clause? It is conceded on behalf of the respondents, the plaintiffs in the action, that this has the effect of making a gift to the son of this debt, of releasing him from the debt as from the date of the distribution.

If the share of the residue had not been equal to the debt, then it was still a debt, and he remained liable to pay and make good the balance, and therefore it is conceded that there is at the time a gift to the son of this amount: a release of him from the debt. But is that the right construction? Is it not this, that these sums which were lent to the son before the date of the will are to be considered as if they were gifts by way of advancement made subsequently, and to be brought into hotchpot on that ground? I think it is the latter construction, although undoubtedly the draftsman has not framed a very good will. I will first go to a clause on which I differ from the Master of the Rolls—that which contains a direction as to conversion. That has, to my mind, a bearing upon the question, because if the view of the Master of the Rolls were right, this clause, which really is a cardinal one, may well bear the construction which he puts upon it; but I cannot agree with the construction which he puts upon this clause of conversion. His construction of that is that the testator directs his executors not to convert personal securities. Now the only personal securities which we know of here are those which were given to him by his son and son-in-law. But he may have lent money to other people, and he may certainly have thought that at the time of his death sums might be due and owing to him on promissory notes from various people, and we are to come, therefore, on the construction of this clause, to this conclusion, that the testator directed his executors not to get in that which was not secured by anything except a promissory note or debt due from an individual, who might not be worth anything if the debt was left outstanding.

Now let us look at the true construction of this clause, "I direct, but subject to the previous dispositions, that my trustees shall convert my personal trust property not consisting of moneys invested in stocks, funds, or securities yielding income"—then between a parenthesis—"other than personal securities." Now I should say that, as a mere matter of ordinary language and ordinary construction, that parenthesis so put in defines certain kinds of securities, and is meant to be an exception and qualification of the previous direction as to securities yielding income. The trustees were to convert the personal estate, but they were not to

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convert that portion of it which consisted of moneys invested in stocks, funds, or securities other than personal securities; and then there was a direction to call in personal securities, that is to say, it was included in the direction to call in "my personal trust property." Personal securities are not included in the direction which points out what is not to be called in, and I think if the clause was put there with the intention which the construction of the Master of the Rolls assumes, it would have been "moneys invested in stocks, funds, or securities yielding income or personal securities." Now, to say that "other than personal securities" is not an exception from securities previously mentioned, but is a direction that personal securities are not to be converted, seems to my mind to be imputing to the testator a rather senseless direction, because he would have said, "other than sums due from my son on the security of promissory notes," and then other persons' securities, which every reasonable man would wish to be got in, would be got in. So, in my opinion, there is a direction to call in personal securities which are to be part of his estate; debts which are to be considered as due to him, and, therefore, to be got in by the executors as part of his personal estate. Is that consistent with this sum due by the son remaining a debt at the time of his death, when the executors would have to perform their duty? If it is to be called in under the previous direction of the will, then it is their duty to get it in and convert it as got in, within a year from the testator's death. But I think it cannot be disputed that this advancement clause, as I will call it, is one which contemplated that the sum due on the promissory note and the interest thereon should not be paid up or called in before the time when this clause is to operate.

Then how can we give this clause a reasonable interpretation? In my opinion it is this, that it is not only a release of him from the debt at the time when the estate is to be divided between the children, but it is a direction, although I agree very badly framed, that these sums shall be treated as if they had been advancements by way of portion to his son, and to be brought in in that way in the distribution of the estate, and to be brought in only in that way; he is not to be sued for them, but they are to be brought in only in that way. What is the result? The cases

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lay down this rule, that if that is so, the widow could not get any benefit at all from those sums; that interest would be chargeable on the amount to be brought into hotchpot from the death of the widow, but that no interest thereon would be payable from the death, the testator having released the debt, and the widow not being entitled to take into account or get the benefit of this direction as to these sums being brought into hotchpot either by way of interest or in any other way. That is quite consistent with my construction of the previous clause as to conversion, because the life interest coming to the widow does not include this, which is not to be considered as any longer a debt due to the trustees, and, therefore, is not within the direction that the personal securities are not to be called in. In this case we know nothing about any other debts which were due to him at the time of his death, but it would be an unsound way of construing a will, to assume that the testator only contemplated that which was actually existing at the date of his death. He lived some six years after the date of his will, and referring to personal securities he must have contemplated that he might have personal securities, moneys due to him on personal securities other than these, and we do not know if he had advanced some on personal security at the time of his death.

In my opinion it is simply a question of construction, and on construction certainly it is not clear, but the true construction of that clause in my opinion is that these sums were dealt with as if they had been advancements by way of gift to his son, and to be accounted for, and that being so that the widow would not be entitled to this interest. I believe Lindley, L.J., is of a different opinion. So the decision will be affirmed.

LINDLEY, L.J. It appears to me that the decision of the Court below was correct.

The state of things was peculiar. This testator had a son and a son-in-law, to whom he had lent certain sums of money, for which he had taken promissory notes bearing interest at 5 per cent. He had entered those sums in his private memorandum book, and he kept an account of interest against both his son and his son-in-law, charging them with interest at 5 per cent., and crediting them with what they did pay, for they did pay

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interest, in one case certainly part of the capital. That was the state of things, and it is not perhaps immaterial to observe that these were old loans. That being the state of things, interest having been paid at 5 per cent., those promissory notes were debts due to the testator at the time of his death. Subject to any direction in his will they would be payable and could be sued for. Jackson's debt could be sued for at law; as to the son he was an executor, and therefore an action could not be brought against him. One thing I think is perfectly plain, and perhaps it is the only thing that is plain on the face of this will, and that is that the testator drew no distinction between the son who was the executor and the son-in-law who was not, but dealt with them both in the same way, and the clause which has given rise to so much difficulty is as much applicable to one as to the other, and would be applicable to any other son to whom he might have made advances either by way of gift or by way of loan.

Now the scheme of the will is also tolerably plain, it is a general trust to convert. I will touch lightly upon that obscure clause, and to speak roughly it is a trust to convert his property into money, and pay the interest or income to his wife for life, and then to divide it amongst the children. The first trust for conversion or direction for conversion is obscure. The Master of the Rolls has put one construction upon it, and Cotton, L.J., has put another, and being obscure it strikes me it is unsafe to take it as a basis of any argument. The construction which I should put upon it, I confess, is that which was put upon it by the Master of the Rolls. I should construe it in this way, that it is in substance a direction to get in all uninvested trust property, except that which is out on personal securities. What he meant by personal securities, whether that includes trade debts, is another matter. That is how I should read this clause; but I think it is too obscure to be safe to reason from. Now the direction to pay the widow the interest is I think a little important: "I direct that my trustees shall permit my wife, she continuing my widow, to receive from my death the net annual income actually produced by my trust property, howsoever constituted or invested." That is a direction that she is to have the interest in arrear down to the testator's death, she is to have that proportionate part. I understand that to mean all other accruing

debts. Now, what I am looking for is this, where is there anything in this will amounting to a clear direction that that interest is to stop? When are these debts converted into gifts or legacies? One must look at that, and see where one is to find out. Now, the place to find out is after the direction to divide the trust property amongst the children at the death of the widow: there comes this proviso, "Provided always, and I declare that any advances made by me to any child, or to the husband of any child in my lifetime, together with interest on such advances from the time of making thereof, as charged against such child or her husband in my private memorandum book in my own handwriting, shall according to the amount thereof be taken in full or in part satisfaction of his or her share in my trust property unless I shall otherwise declare." Now, when is that to come into operation? It is said on the one hand it is to come into operation the moment the testator dies; I cannot come to that conclusion. It appears to me it comes into operation at the time when the children are dividing the residue. Whether the word "advances" there is used to cover both gifts or loans, if there were any gifts—which is my own impression—or whether it is to cover loans here, it seems to me to include loans by reason of the reference to the memorandum book, and I do not think when we bear in mind that these were indisputably debts bearing interest, that we can say that the interest is to be stopped before the time arrives for extinguishing the principal debt. When the fund is to be divided, the debt is to be deducted, or the advance, or whatever it is called, is to be deducted from the share, and then everything works perfectly smoothly. The result of the other construction appears to me to do violence to the will; it is really to prefer the son and the son-in-law to all the other children, which I do not think this will contemplated. I think on the contrary the testator intended to put everybody in precisely the same position, he meant to provide for the wife for life, and then to make an equal provision for his children.

Appeal dismissed.

Solicitors for plaintiffs: *E. & F. Bannister.*

Solicitors for defendant: *Park Nelson, Morgan, & Gemmell,* for *G. B. Footner & Son, Romsey.*

J. E. H.

1885
June 30.

CRABTREE *v.* ROBINSON AND ANOTHER.

Landlord and Tenant—Distress—Entry by raising Window partly open.

Entry into a house for the purpose of distraining may lawfully be made by further opening a window which is partly open.

ACTION for an illegal distress tried in the County Court for Yorkshire holden at Otley.

The plaintiff was tenant of certain premises to the defendant Robinson, who distrained for rent. The bailiff employed to make the distress found a window partly open but not sufficiently to admit of his entering the house, and by direction of the defendants (the landlord and a broker employed by him) he raised the window and so obtained access to the house and opened the front door. The defendants then distrained. The county court judge held that the entry so made was not illegal, and entered a verdict for the defendants. A rule was obtained to enter a verdict for the plaintiff or for a new trial, against which

June 22. *Julian Robins* shewed cause. It is lawful to enter either by door or window to make a distress: 1 Roll. Abr. 671, Distress, M. quoting a Petition of Parliament, 18 Edw. 1, fol. 7; *Nixon* v. *Freeman.* (1) Violence must not be used, so that if a window is closed though not fastened it cannot be opened: *Nash* v. *Lucas.* (2) But just as a landlord may open the outer door, *Ryan* v. *Shilcock* (3), so he may raise a window that is partly open. The question whether the entry is lawful or not must depend on whether the window is closed or open, and cannot turn on the degree to which it is open, and whether access can be obtained without moving it a few inches. He cited *Semayne's Case* (4); *Gould* v. *Bradstock* (5); *Sandon* v. *Jervis* (6); *Rex* v. *Smith.* (7)

(1) 5 H. & N. 647.
(2) Law Rep. 2 Q. B. 590.
(3) 7 Ex. 72; 21 L. J. (Ex.) 55.
(4) 5 Rep. 91; 1 Smith's Leading Cases; 5th ed. 85.
(5) 4 Taun. 562.
(6) E. B. & E. 935, 942; 27 L. J. (Q.B.) 279; 28 L. J. (Ex.) 156.
(7) 1 Mood. C. C. 178.

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Morton Smith, in support of the rule. The question is, whether there has been violence so as to make the entry a breaking and entering. A door may be opened as suggested by Lush, J., in *Nash* v. *Lucas* (1), because that is the usual mode of entry, and a licence to enter for a lawful purpose may be implied. Assuming an entry may be made by an open window no licence can be implied to enter by one that is partially closed, and it must be as much using violence to open a window in that state as to open one that is closed but not fastened.

June 30. The judgment of the Court (Field and Manisty, JJ.) was delivered by

MANISTY, J. This is an appeal from a judgment of the county court judge, sitting at Otley, for the county of Yorkshire. The action was for illegal distress, and except as to a small point about fixtures, as to which I will only say that I think the judge was quite right, the only question was whether the distress was illegal, seeing that the bailiff entered the house through the window, which was partly open, by raising it sufficiently to enable him to get in. The question is, whether this is a breaking into the house which rendered the distress illegal. There is no doubt that a bailiff cannot legally enter a house by breaking into it, and it is settled law that if a window is closed and the bailiff opens it and so enters, the entry is a breaking into the house and illegal. It may seem somewhat strange that if the window is open a small distance, perhaps two or three inches, the bailiff may raise it and get in, but on that point, also, the decisions are, in my opinion, conclusive. The only two cases I intend to notice of the many that were cited are, first, *Rex* v. *Smith* (2), on which the county court judge acted, and, as I think, rightly. There the prisoner was indicted for breaking and entering a dwelling-house the window of which was partly open but not sufficiently to admit a person without raising it. All the judges met to consider the case and came to the conclusion that an entry made by raising the sash could not be held to be a breaking into the house, not being within the principle of any of the preceding cases, which the Court were unwilling to extend. That was a criminal case, but

(1) Law Rep. 2 Q. B. at p. 593. (2) 1 Mood. C. C. 178.

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the county court judge rightly argued that if that case correctly laid down the law as to entry for a criminal purpose it was impossible to contend that an entry in a similar manner for a lawful purpose constitutes an illegal entry. There are other cases to the same effect, but the only other case which I shall notice is *Nash* v. *Lucas.* (1) There it was held that an entry by opening a window which was shut but not fastened was unlawful. That seems to me to be in accordance with the authorities, but the case was mainly relied on for the dictum of Lush, J., in the course of the argument in which he drew the distinction between entry by a closed but unfastened door and entry by a window, on the ground that the door is the usual mode of access, and that a licence from the occupier to any one to enter who has lawful business may be implied from its being unfastened, while no such licence can be implied from a window being left unfastened. This does not touch the point before us, where the window is not closed. The cases seem to result in this, that to make an entry the latch of a door may be lifted though the door be closed, but that in the case of a window entry can only be made if the window is to some extent open, and that for the purpose of entry in such cases the window may be further opened. The authorities seem to me to support the judgment of the county court judge, and my Brother Field concurs in this view. This appeal must, therefore, be dismissed with costs.

Appeal dismissed; leave to appeal refused.

Solicitors for plaintiff: *Le Riche & Son, for Robinson & Robinson, Keighley.*

Solicitors for defendants: *Henry Ikin, for Child & Groom, Otley.*

(1) Law Rep. 2 Q. B. 590.

A. M.

ELLIOTT *v.* HALL.

1885
July 16.

Negligence—Breach of Duty—Articles sold consigned in Defective Truck to Vendee—Injury to Servant of Vendee.

The defendant, a colliery owner, consigned coals sold by him to the buyers by rail in a truck rented by him from a waggon company for the purposes of the colliery. Through the negligence of the defendant's servants the truck was allowed to leave the colliery in a defective state. In consequence of the defect in the truck injury was occasioned to the plaintiff, one of the buyers' servants, who was employed in unloading the coals, and had got into the truck for that purpose:—

Held, that there was a duty on the part of the defendant towards the plaintiff to exercise reasonable care with regard to the condition of the truck, and the defendant was therefore liable to the plaintiff in respect of the injuries sustained by him.

MOTION by the plaintiff for judgment, and cross-motion by the defendant for a new trial.

The action was in respect of personal injuries alleged to have been occasioned to the plaintiff through the defendant's negligence.

At the trial before Pollock, B., at the last Leicester Summer Assizes, the facts appeared to be as follows:—

The plaintiff was a servant employed by the Leicester Coal Consumers' Company in unloading coal from trucks at their sidings at the West Bridge Station, at Leicester. The defendant was a colliery proprietor, who supplied coal to the Leicester Coal Consumers' Company under contracts with them. The defendant had a line from the colliery communicating with the Midland Railway at Bagworth station, near Leicester. The defendant's servants delivered to the Midland Railway Company at Bagworth a truck full of coals consigned to West Bridge Station, Leicester, to the order of the Leicester Coal Consumers' Company. The truck remained on the railway company's sidings at Bagworth for about six weeks: it was then forwarded to West Bridge Station, and placed there on sidings belonging to the Leicester Coal Consumers' Company. Two days afterwards the servants of that company began to unload the truck. The truck had a trap-door in the bottom used when required for the purpose of unloading into a

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vessel. This door, when shut, was supported by a bar which was kept in its position by means of a fastening called a cotter. The efficiency of this fastening depended upon the existence of a catch or small projection at the end of an iron pin, which prevented the pin, when passed through a slit, from repassing, except when held in a certain position. The plaintiff got into the truck to unload it, and was engaged in so doing when the door fell down and he fell through the opening on to the rails, and thereby sustained the injuries in respect of which the action was brought. Upon inspection of the truck after the accident, it appeared that the catch on the pin above-mentioned was worn away, and probably had been so for some months. The truck in question was rented by the defendant for the purposes of the colliery from the Midland Waggon Company. It was stated by the defendant's manager that, by the contract between the Midland Waggon Company and the defendant, the waggon company were to repair the waggons let out by them, and that they kept repairing stations and inspectors of waggons at Bagworth and Leicester for that purpose, but he admitted that it was the practice at the defendant's colliery to do trifling repairs to waggons rather than incur the delay caused by sending them to be repaired by the waggon company. It was proved that it was the duty of an inspector of waggons employed by the Midland Railway Company to inspect waggons at Bagworth and also at Leicester. A servant in the employ of the defendant stated that he had examined the truck in pursuance of his duty before it was passed on to Bagworth sidings, and did not observe any defect in it.

In answer to questions left to them by the learned judge, the jury found that there had been no contributory negligence on the part of the plaintiff, and that the accident had occurred through the negligence of the defendant, and gave a verdict for the plaintiff for 200*l.* damages. The learned judge declined to give judgment, leaving either party to move for judgment. The plaintiff now moved for judgment, and the defendant applied, by way of cross-motion, for a new trial on the ground that upon the facts there was no duty shewn on the part of the defendant towards the plaintiff to use care with regard to the condition of the truck.

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Sills, and *Toller*, for the plaintiff. The defendant must have contemplated that the truck forwarded by him would be unloaded by the purchaser's servants, and must be taken to have forwarded it for that purpose. It was necessary for the purpose of unloading to get into the truck. There was therefore clearly an invitation by the defendant to the plaintiff to get into the truck, and that being so, there was a duty cast on the defendant, through his servants, to take reasonable care that the truck was in a safe and proper condition for use for the purposes for which it was sent: *Indermaur* v. *Dames* (1). The facts of this case bring it within the rule laid down by the Master of the Rolls in *Heaven* v. *Pender* (2), viz., that, whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

[They were stopped by the Court.]

E. Lumley, for the defendant. There was no duty on the part of the defendant to the plaintiff to use reasonable care with regard to the condition of the truck. Certain cases, no doubt, establish the proposition that, if there is what has been called an invitation to enter premises, the occupier of the premises is responsible in respect of a concealed danger constituting a trap for the person invited. That doctrine is not confined to real property, but would include the case of a person invited to enter a chattel, such as a ship, or a cart, in the occupation or charge of the person giving the invitation: *Smith* v. *Steele* (3); but it is contended that the doctrine is not applicable to chattels not in the occupation, nor in the custody, nor under the management of the person sued, at the time when the accident happens. The doctrine is not applicable to the case of articles supplied or sent out into the world which are not under the control or, so to speak, in the occupation of the defendant. This truck was in the possession of the railway company, and had been so for six weeks, and it

(1) Law Rep. 1 C. P. 274; Law Rep. 2 C. P. 311.
(2) 11 Q. B. D. 503. (3) Law Rep. 10 Q. B. 127.

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was the duty of their inspector to inspect it. There is a natural limit to the liability created by inviting a person into premises or a chattel in the occupation or under the control of the inviter, because it is within a person's own option whom he will so invite. In the case of a chattel which is sent out into the world, and the possession of which is parted with, the liability would be most sweeping and indefinite, if there is a duty to any person whose use of the chattel may by any possibility be contemplated. There would hardly be any limit to such a liability, either with regard to the persons towards whom it existed or the time during which it would continue. Suppose the vendees of the coal had passed on the truck to sub-vendees, and they again to other sub-vendees, would there be a duty to the servants of the latter? Yet it might be said that the defendant ought to have contemplated the unloading of the truck by a sub-vendee's servants. It must be observed that in *Heaven* v. *Pender* (1) Cotton, L.J., and Bowen, L.J., expressly decline to put their judgment on so broad a ground as that given by Brett, M.R. It is contended that even the more extensive doctrine laid down by the Master of the Rolls does not cover this case, for, on page 110, he confines the supposed duty to cases of goods supplied to be used immediately by a particular person or persons or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity could occur for discovering any defect which might exist. He excludes a case where the goods are supplied under circumstances in which it would be a chance by whom they would be used, or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect. It is contended that, having regard to the facts that the truck was so long at the Bagworth sidings, and out of the defendant's possession, that it was quite uncertain when it would be unloaded, and by whom, and that, if the railway inspector had done his duty, the defect would have been discovered before the plaintiff unloaded the truck, the case does not come even within the doctrine laid down by the Master of the Rolls. He also

(1) 11 Q. B. D. 503.

cited *George* v. *Skivington* (1); *Collis* v. *Selden* (2); *Gautret* v. *Egerton* (3); *Langridge* v. *Levy* (4); *Winterbottom* v. *Wright* (5); *Longmeid* v. *Holliday*. (6)

Sills was not called on to reply.

GROVE, J. This appears to me a much stronger case in favour of the plaintiff than the case of *Heaven* v. *Pender*. (7) In that case the real question seems to have been whether the owner of the dock was liable, or whether the plaintiff's proper remedy was against the shipowner with whom the plaintiff's employer had contracted to paint the ship. The decision in the Court below seems really to have been that the plaintiff had sued the wrong person. In my opinion the plaintiff in the present case is entitled to recover quite independently of the decision of the Court of Appeal in *Heaven* v. *Pender*. (7) The defendant hired the truck, it is true, from the Midland Waggon Company. The question, however, is not as to the existence or non-existence of any liability on the part of that company, but whether the defendant, who had the entire dominion over the truck, is liable to the plaintiff in respect of its defective condition. It was clearly part of the contract for the sale of the coal to the plaintiff's employers that it should be conveyed in a truck to the buyers, and it must necessarily have been contemplated that, when it arrived at its destination, the truck would be unloaded by the buyers' servants. I think it is plain that under these circumstances a duty arose on the part of the defendant towards the plaintiff. If vendors of goods forward them to the purchasers, and for that purpose supply a truck or other means of conveyance for the carriage of the goods, and the goods are necessarily to be unloaded from such means of conveyance by the purchaser's servants, it seems to me perfectly clear that there is a duty on the part of the vendors towards those persons who necessarily will have to unload or otherwise deal with the goods to see that the truck or other means of conveyance is in good condition and repair so as not to be dangerous to such persons. I do not say

(1) Law Rep. 5 Ex. 1.
(2) Law Rep. 3 C. P. 495.
(3) Law Rep. 2 C. P. 371.
(4) 2 M. & W. 519; 4 M. & W. 337.
(5) 10 M. & W. 109.
(6) 6 Ex. 761.
(7) 11 Q. B. D. 503.

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that the vendors would be responsible for latent defects, or matters that they could not reasonably foresee, but they are, in my opinion, bound to see that the machinery of the truck is apparently in good order. It is contended that there is no duty because there was no contract with the plaintiff, but the plaintiff was acting as the servant of the company with whom the contract was made, and the defendant must have known that the buyers would not unload the coal themselves and that their servants would do so. Under these circumstances it seems to me clear that there was a duty not to be guilty of negligence with regard to the state and condition of the truck. It is urged that the truck stood for six weeks at the station of the Midland Railway Company, and that the inspector of that company ought to have examined it there, but we are not inquiring now whether there was any negligence or liability on the part of the Midland Railway Company, but whether the defendant is liable for having sent out a defective truck, and I am clearly of opinion that he is.

None of the authorities appear to me to throw any doubt upon that conclusion. As I have said before, this seems to me a much stronger case than *Heaven* v. *Pender* (1), where it was held that the defendant was liable. *Indermaur* v. *Dames* (2) also does not seem to me so strong a case as this. This is not the mere case of a person lawfully coming into premises for the purposes of business, but the defendant must have known that the plaintiff must necessarily get into the truck for the purpose of unloading the coal. The only case that seems somewhat in defendant's favour is the case of *Collis* v. *Selden* (3), where it was alleged that the defendant improperly and negligently hung a chandelier in a public-house. The Court held, on demurrer to the declaration, that there was no duty sufficiently shewn towards a person who got under the chandelier and upon whom it fell, it not being shewn who he was, or how or on what business he came to be there. I think the judgment of Byles, J., really shews the grounds on which the Court acted. He says, "It does not appear here what capacity the defendant fills. He may be a servant or a master workman. He may be lessor of the premises or lessee

(1) 11 Q. B. D. 503.

(2) Law Rep. 1 C. P. 274; Law Rep. 2 C. P. 311.

(3) Law Rep. 3 C. P. 495.

or sub-tenant. All is left in doubt. Who and what is the plaintiff? All we know of him is that he is not a trespasser. He may have been a guest. That alone would not give him a cause of action. He may have gone into the house to get change for half-a-crown, or to make some inquiry. I cannot see any relation which he bears to the defendant, whence a duty would result which has been infringed." It seems to me that the case was really decided on the ground of the uncertainty of the declaration as to the relation between the plaintiff and the defendant. I must say I should myself have felt some difficulty in coming to the same conclusion as the Court came to in that case. But I do not think that the case is really an authority which bears upon the circumstances of the present case. For these reasons I am of opinion that the plaintiff is entitled to judgment, and that the application for a new trial should be refused.

SMITH, J. I am of the same opinion, and I have not much to add. The case seems to me, I must say, a very clear one. The plaintiff sues the defendant for breach of duty in negligently allowing a truck which the plaintiff had to unload to be in a defective condition. It was said that the defendant was not the owner of the truck, but the evidence was that it was and had for some time been in his possession, and that it was the duty of the defendant's servants to examine it, and that they did examine it before it went out from the colliery. It is true that the waggon owners repaired the trucks which they let out, but I do not think that that fact, or the fact that the waggon was delayed for six weeks at Bagworth station makes any difference. There was evidence that the truck was insecure when it left the defendant's colliery, and that, if due care had been taken, the defendant's servants would have found out the cause of the insecurity, viz., that the catch on the pin was worn out, and probably had been so for some time. There was also evidence for the jury that the accident did not occur by reason of any contributory negligence of the plaintiff. It was argued, however, that, though the defendant was guilty of negligence, the plaintiff cannot succeed because there was no duty owed by the defendant to the plaintiff

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to take care with regard to the condition of the truck. But it appears to me that there was such duty. Look first at the position of the plaintiff. He is not merely one of the general public, or a bare licensee, or stranger. He is not a person who had no business in the truck. It was his duty to unload the truck. Then what is the position of the defendant? The defendant had entered into a contract for the supply of coal to the plaintiff's employers, and sent the truck loaded with coal for the purpose of being unloaded by the buyer or his servants. Those being the respective positions of the plaintiff and defendant, I cannot see how it can be said that there was no duty owing from the defendant to the plaintiff to see that the truck, which the plaintiff was to unload, was in a safe state. It seems to me to make no difference that the truck was six weeks upon the journey. The duty existed when the truck started from the colliery, and the truck was unsound then. If it could have been made out that something had happened in the six weeks which rendered the truck unsound, the case would have been different. But I cannot see how it can be said that, because the truck was six weeks on the road, the duty which otherwise would have existed was got rid of. Again, it was argued for the defendant that a duty such as this has never been held to exist except as against a person occupying or in possession of premises or property. I do not think that this is so. It seems to me that the case of *Foulkes* v. *Metropolitan District Ry. Co.* (1) was very similar to the present case. There the plaintiff sued a railway company from whom he had not taken his ticket, and it was urged that he could not sue the defendants, because they had not contracted with him. But the Court held that there was a duty towards the plaintiff on the part of the defendants, because they had allowed him to come into their carriage. The principle on which that case was decided seems to me to apply to the present case. If the judgment of Thesiger, L.J., in the Court of Appeal is considered, it will I think be found that it is not essential to the existence of the duty that the defendant should be in the occupation or possession of the property through the defect in which the injury arises.

(1) 4 C. P. D. 267; 5 C. P. D. 157.

For these reasons I think it clear that there was in this case a duty on the part of the defendant towards the plaintiff.

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Judgment for plaintiff, and application for new trial refused.

Solicitors for plaintiff: *Rodgers & Clarkson, for Hincks & Topham.*

Solicitors for defendant: *Crowder, Anstie & Vizard, for Owston, Dickinson & Simpson.*

E. L.

[CROWN CASE RESERVED.]

May 9.

THE QUEEN *v.* McDONALD.

Larceny by a Bailee—24 & 25 Vict. c. 96, s. 3—Infant, Bailment to.

An infant over fourteen years of age fraudulently converted to his own use goods which had been delivered to him by the owner under an agreement for the hire of the same:—

Held, that he was rightly convicted of larceny as a bailee of the goods under 24 & 25 Vict. c. 96, s. 3.

CASE stated for the opinion of the Court for the Consideration of Crown Cases Reserved, the facts of which were in substance as follows:—

The prisoner, John Lawrence McDonald, was indicted at the Easter Quarter Sessions for the county of Devon for larceny as a bailee of goods the property of the prosecutor, James Humphrey Brown. At the trial it was proved that the prosecutor was a draper and furniture broker in Torquay, and that in March, 1884, he supplied certain furniture to the prisoner under a hiring agreement, the terms of which were to the following effect: The said J. H. Brown thereby let on hire, and the said J. L. McDonald agreed to hire, the goods, furniture, and effects specified in a schedule to the contract, and which had been placed in a certain dwelling-house, for the term of forty-two months, at the sum of 8*l.* per quarter, payable on certain specified quarter days; and it was agreed that the said J. L. McDonald would not injure or damage the said goods, furniture, and effects, or give any bill of sale upon them, or remove them without the consent of the

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said J. H. Brown, and that, if the instalments of hire were not paid according to the terms of the agreement, or if any execution were allowed to be levied on the said goods, furniture, or effects, the said J. H. Brown should have immediate power to retake possession thereof and remove the same. It was further agreed that the said goods, furniture, and effects should not belong to the said J. L. McDonald until the same had been fully purchased and paid for, but that, until default were made by him in the terms and conditions before expressed, he should and might quietly hold and enjoy the said goods, furniture, and effects under the provisions and terms thereinbefore stated, paying interest on the total amount contained in the schedule at the rate of 5 per cent. per annum monthly or quarterly.

It was further proved that the prisoner paid the first four quarterly instalments and no more, and that he afterwards, without any notice to the prosecutor and without the consent or knowledge of the prosecutor, removed the goods mentioned in the indictment, being part of those supplied him under the contract, and sold the same. It was also proved that the prisoner was born on the 21st of May, 1865, and so was not of full age when he entered into the contract set out; and the objection was thereupon raised by counsel on his behalf that there was no case to go to the jury, inasmuch as the only larceny attempted to be proved against the prisoner was larceny of goods of which he was at the time bailee by virtue of the contract above set out, whereas by reason of the prisoner being under age when he entered into the contract it was void, and therefore did not operate to create a bailment within the meaning of 24 & 25 Vict. c. 96. The court of quarter sessions let the case go to the jury, but reserved the point. The jury found the prisoner guilty.

The Hon. Bernard Coleridge, for the prisoner. The offence with which the prisoner was charged, viz. that of larceny as a bailee, depends upon the existence of a contract of bailment. Being an infant, the prisoner was incapable of making such a contract, and therefore cannot be guilty of this offence. By the Infants' Relief Act, 37 & 38 Vict. c. 62, s. 1, all contracts for goods supplied to infants other than necessaries are rendered

absolutely void. The prisoner cannot be guilty of larceny at common law, because the owner had parted with the legal possession of the goods to him, and his original possession was therefore lawful.

[CAVE, J. Surely there was a bailment in the sense that there was a delivery upon condition. The infant was in lawful possession of the goods only by reason of the owner's having delivered them to him upon certain conditions.]

The fact of the delivery by the owner no doubt remains, though the contract is void; but the existence of the condition depends upon the contract. It is like the case of goods not necessaries supplied by a tradesman to an infant and consumed by him. The tradesman cannot recover the price of the goods, because the contract is void; but the infant's possession and use of the goods does not become wrongful. It is impossible to say that at common law there was a larceny, because there was not any taking of the goods against the will of the owner; therefore the offence must depend on the breach of the condition of the bailment, and an infant cannot be affected by the condition. It is clear law that the bailor could not by treating the breach of contract as a tort recover against an infant in an action for breach of the condition of the bailment: *Jennings* v. *Rundall.* (1)

[CAVE, J. Suppose that the owner of a horse entrusts it to an infant livery-stable keeper, or a livery-stable keeper hires a horse to an infant undergraduate, could it be contended that the owner could never recover the horse again? Surely, although the law will not imply a promise by the infant to restore the horse, the owner can bring an action of detinue if the infant refuses to give up the horse. On the other hand the infant must get, by the delivery of the horse to him, such a special property in the horse as would entitle him to bring an action against a wrongdoer depriving him of the possession of it. There is therefore a delivery which creates a special property in the person to whom the delivery is made, the general property remaining in the original owner. What is that but a bailment?]

In the present case, the prisoner having paid all the instalments that had become due under the contract, the condition upon which

(1) 8 T. R. 335.

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the bailment was to determine was never fulfilled, and his title to the possession of the goods under the bailment continued to exist.

[WILLS, J. The bailment is determined by any dealing with the goods inconsistent with the terms of it.]

[He cited *Mills* v. *Graham* (1); *Reg.* v. *Robson* (2); *Reg.* v. *Denmour* (3); 24 & 25 Vict. c. 96, s. 3; *Wright* v. *Leonard* (4); *Bartlett* v. *Wells* (5); *Burnard* v. *Haggis* (6); *Reg.* v. *Wilson.* (7)]

McKellar, for the Crown, was not called upon.

LORD COLERIDGE, C.J. I am of opinion that this conviction must be affirmed. The prisoner is stated in the case to have been indicted for larceny "as a bailee." It appears to me very doubtful whether the words "as a bailee" are not mere surplusage. The 3rd section of 24 & 25 Vict. c. 96, says, that a person who being a bailee fraudulently takes or converts the property bailed to his own use shall be guilty of larceny and may be convicted thereof on an indictment for larceny. It seems to me therefore possible, though I express no opinion on the point, that the argument in the present case arises on words which were not material, but for the purposes of my judgment I will assume that they were material. It is said that the prisoner cannot be convicted of larceny as a bailee, because being an infant he was not competent to enter into a contract of bailment; that, the offence charged against him depending upon his having acted in a manner inconsistent with the terms of a contract, he being unable to enter into such a contract cannot be guilty of the offence. It seems to me that this contention is based upon an assumption which is not correct in law. It is not correct, as it appears to me, to use the expression "contract of bailment" in a sense which implies that every bailment must necessarily in itself be a contract. I do not so understand the definitions of the term "bailment." It is perfectly true that in almost all cases a contract either express or implied by law accompanies a bailment, but it seems to me that there may be a complete bailment without the contract.

(1) 1 B. & P. (N.S.) 140.
(2) L. & C. 93; 9 Cox, C. C. 29.
(3) 8 Cox, C. C. 440.
(4) 11 C. B. (N.S.) 258; 30 L. J. (C.P.) 365.
(5) 1 B. & S. 836; 31 L. J. (Q.B.) 57.
(6) 14 C. B. (N.S.) 45; 32 L. J. (C.P.) 189.
(7) 49 L. J. (M.C.) 13.

According to all the definitions, as, for instance, those given in Sir William Jones, Blackstone, and Kent's Commentaries, 12th ed. p. 764, it would appear that a bailment consists in the delivery of an article upon a condition or trust. It is true, I know, that the authors of those various definitions go on to say that there is a promise or contract to restore the goods, but this is not, as it seems to me, the bailment itself, but a contract that arises out of it. It may be true that the prisoner in the present case could neither expressly nor impliedly promise to restore the goods, but nevertheless he had the goods delivered to him on a condition or trust and so delivered as to create in him a special property. That being so, he fraudulently appropriates them to his own use in a manner inconsistent with the special property so created. The 3rd section of 24 & 25 Vict. c. 96, says in effect that a person who has obtained delivery of and a special property in goods, and who cannot therefore at common law be guilty of larceny of such goods, shall, if he fraudulently take or convert the same to his own use, be guilty of statutory larceny. It seems to me that undoubtedly the prisoner, though a minor, had the special property in or right of possession of these goods which was contemplated by those who framed this enactment when they used the term "bailee"; that having such special property he proceeded to abuse it and fraudulently to convert the goods to his own use; and that he is therefore guilty of the offence created by the section. He is guilty of the offence, not because he has broken a contract, which he was incapable of making, but because, being capable of becoming a bailee of these goods and having become one, he dealt with the goods in such a manner as by the terms of the Act to render him guilty of the crime of larceny.

CAVE, J. I am of the same opinion. The case is one of some legal interest becauses it raises the question that was discussed and left undetermined in the case of *Reg.* v. *Robson.* (1)

On consideration of the point I have come to the conclusion that the conviction should be affirmed on the following grounds. The definitions of the term "bailment" as given by the authorities, such as Sir William Jones and Blackstone, are very similar.

(1) L. & C. 93.

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I will take that given by Sir William Jones as an example. He defines a bailment to be "a delivery of goods on a condition express or implied that they shall be restored by the bailee to the bailor or according to his directions as soon as the purpose for which they are bailed shall be answered." A bailment therefore is a delivery on condition. It is true no doubt that the law usually implies upon such bailment a contract to re-deliver when there is not an express promise to do so. In the case of a married woman, it has been held that no such contract could at common law be implied, but, though there be no contract, the fact of the delivery, which is a delivery upon condition, still remains, and the whole transaction is not a mere nullity. That there may be a bailment without a contract seems to me to be shewn conclusively, if it be the case that the delivery upon condition creates in the infant a special property which comes to an end when the condition is fulfilled, the entire property then reverting to the bailor. The delivery of goods on a condition to an infant must, as it appears to me, create in him a special property which is so far recognised and protected by the law that he could bring an action, whilst the special property lasted, against any person depriving him of the goods. His property, however, is not absolute; it can only exist till the condition is fulfilled; the owner can then demand the return of the property and maintain an action for the conversion of it if not re-delivered. The law thus recognising a special property in the infant, he is to all intents and purposes a bailee of the goods, though the law does not in his case imply a contract to perform the terms of the bailment. That being so, it seems to me that the case is clearly within the mischief of the 3rd section of 24 & 25 Vict. c. 96, and I cannot see why the infant is not a bailee for the purposes of the section.

DAY, SMITH, and WILLS, JJ., concurred.

Some doubt having been raised as to the correctness of the above decision, the question was subsequently ordered to be re-argued, and was reargued on the 20th of June before Lord Coleridge, C.J., Grove and Denman, JJ., Pollock, B., Field, J., Huddleston, B., Manisty, Hawkins, Mathew, Cave, Day, Smith, and Wills, JJ.

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The Lord Chief Justice stated that the Court did not sit as a Court of Criminal Appeal to hear the case by way of appeal against the above decision, but as an assembly of the judges in accordance with the old practice at common law previous to the statute 11 & 12 Vict. c. 78.

After the Court had heard the arguments of the counsel for the prisoner and for the Crown, the Lord Chief Justice announced that the majority of the Court were of opinion that the prisoner was rightly convicted.

Conviction affirmed.

Solicitors for prosecution: *Ford, Lloyd, Bartlett, & Michelmore.*
Solicitors for prisoner: *Hamlyn & Hutchings.*

E. L.

IN RE RYLEY. EX PARTE THE OFFICIAL RECEIVER.

May 11.

Default in Payment of Instalment of Judgment Debt—Commitment Order—Bankruptcy—Arrest of Debtor—Payment under Protest—Title of Trustee to Money paid—Bankruptcy Act, 1883, *ss.* 9, 121—*County Court Rules*, 1884, *rr.* 1–4.

After a commitment order had been issued by the Mayor's Court in London against a judgment debtor for default in payment of an instalment of the judgment debt, a receiving order was made against him under s. 9 of the Bankruptcy Act, 1883:—

Held, that the commitment order was not a process for contempt of Court, but to enforce payment of a debt provable in the bankruptcy, and that after the making of the receiving order the debtor was privileged from arrest.

ON the 12th of February, 1885, a receiving order was made against E. C. Ryley, who was the registrar of a county court, and on the 23rd of February an order was made under s. 121 of the Bankruptcy Act, 1883, for the summary administration of his estate.

On the 24th of February the debtor was on his way to the office of the official receiver with 4*l.*, part of his estate, when he was arrested by the serjeant-at-mace of the Mayor's Court of London on a warrant issued by that Court prior to the 12th of February, at the instance of a creditor, who had recovered judgment against him in that court. The debtor explained to the serjeant-at-mace his position, and that a receiving order had been

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made against him, but he refused to release him; and in order to avoid being committed to prison he paid to the serjeant-at-mace under protest the sum of 2*l.* 8*s.* 6*d.*, being the amount of the instalment then due to the creditor under his judgment, and for default in payment of which the order for commitment had been made.

The official receiver now applied for an order that the 2*l.* 8*s.* 6*d.* in the hands of the serjeant-at-mace might be paid over to him as part of the debtor's estate.

Muir Mackenzie, for the official receiver. After the receiving order the 2*l.* 8*s.* 6*d.* formed part of the debtor's estate divisible amongst his creditors, and under s. 9 of the Bankruptcy Act, 1883, the creditor was not entitled to any remedy against the person or property of the debtor in respect of his debt without the leave of this Court, which has not been obtained. The arrest was in the nature of a civil process to enforce payment of a debt provable in the bankruptcy: *Cobham* v. *Dalton* (1); *In re Deere* (2); *Lees* v. *Newton.* (3)

[CAVE, J., referred to rules 1–4 of the County Court Rules, 1884.]

Mr. *Tucker* (solicitor), for the serjeant-at-mace. The arrest was not a civil process to enforce payment of a debt. It was a commitment for a contempt of Court, and the money was paid to purge his contempt of Court. Further, money cannot be earmarked, and the evidence does not shew that the 2*l.* 8*s.* 6*d.* was part of the debtor's estate. It might have been given him by a friend for the purpose.

CAVE, J. I am of opinion that s. 9 of the Bankruptcy Act, 1883, and the case of *Cobham* v. *Dalton* (1) apply to this case, and that immediately on the making of the receiving order the creditor, by virtue of s. 9, lost his right to enforce payment by arresting the debtor. That this is the true construction of the Act appears to be borne out by the County Court Rules of January, 1884, to which I have just referred. Rule 1 provides: "where a judgment debtor shall, upon the return day of a judgment summons, satisfy the Court that a receiving order has been made

(1) Law Rep. 10 Ch. 655. (2) Law Rep. 10 Ch. 658.
(3) Law Rep. 1 C. P. 658.

for the protection of his estate, or that he has been adjudicated a bankrupt, and that the debt was provable in the bankruptcy .... no order of commitment shall be made." That rule would not in express terms apply to this case, because the order of commitment was made before the receiving order, but it shews that the order of commitment is not a process for contempt, but is simply a method of enforcing payment of a debt. If it were a process for contempt, there could be no reason why a receiving order should prevent the debtor from being arrested in respect of such contempt. Then rule 2 says, "where a judgment debtor shall, after the making of an order of commitment against him, file in the court in which the order was made an affidavit according to the form in the Appendix, stating that a receiving order has been made for the protection of his estate, or he has been adjudicated a bankrupt, and that the debt was proveable in the bankruptcy .... or that an order for the administration of his estate has been made under s. 122 of the Bankruptcy Act, 1883, annexing to such affidavit in such last-mentioned case a certificate of the registrar of the court in which such last-mentioned order shall have been so made, and shall forthwith, upon such affidavit being so filed, give notice to the judgment creditor of the filing thereof, such order of commitment shall not issue, but if issued and not executed, it shall be recalled;" and rule 3, "where a judgment debtor is arrested, he may file in the county court, within the district of which he is in custody, an affidavit as mentioned in the last preceding rule, and give notice to the judgment creditor thereof, as therein required, and thereupon the judgment debtor shall be discharged out of custody upon the certificate of the registrar of that Court." Therefore the commitment order is not a process for contempt, but to enforce the payment of money; and after the receiving order that process is suspended, and the creditor has to obtain the debt by the ordinary procedure under the bankruptcy, and has to prove as an ordinary creditor. I think, therefore, that the official receiver is entitled to the order for which he asks, with costs.

Solicitor for official receiver: *W. W. Aldridge.*
Solicitor for serjeant-at-mace: *J. Tucker.*

1885
May 21.

IN RE MAGEE. EX PARTE MAGEE.

Bankruptcy—Practice—Affidavit sworn Abroad—British Vice-consul—Notarial Certificate—18 & 19 *Vict. c.* 42, *ss.* 1, 2, 3—*Bankruptcy Act*, 1883, *s.* 135—*Schedule I., r.* 14—*Bankruptcy Rules*, 1883, *r.* 50.

When an affidavit or proof in bankruptcy is sworn abroad before a British consul, or vice-consul, a notarial certificate in verification of the signature and qualification of the consul, or vice-consul, is not required.

The notarial certificate is only required when such an affidavit or proof is sworn before a foreign functionary.

AT the first meeting of creditors held under the bankruptcy of A. E. Magee, the assistant official receiver being in the chair, a proof was tendered on behalf of J. Magee for 3408*l.* 18*s.*

J. Magee was resident in Paris, and had sworn the proof before the British vice-consul there, and the jurat ran as follows:—"Sworn at Paris, Republic of France, this 21st day of April, 1885. Before me, Falconer Atlee, her Majesty's consul at Paris," and bore the consulate seal.

The chairman rejected the proof for voting, on the ground that the jurat was not in conformity with s. 135 of the Bankruptcy Act, 1883.

J. Magee now moved by way of appeal from the decision of the chairman for an order that his proof might be declared to be, and be admitted as, a valid proof for voting, and that the resolutions purporting to have been come to at the first meeting of creditors might be declared invalid, and, if necessary, a new first meeting directed.

H. Reed, for the appellant. Under the 243rd section of the Bankruptcy Act, 1849, affidavits might be sworn out of the jurisdiction before a judge or magistrate, his signature being authenticated by the official seal of the Court to which he was attached, or by a public notary, or before a British minister, consul, or vice-consul; and in *Ex parte Bird* (1) the Court of Appeal, under this section, held that where affidavits were sworn before a British minister, consul, or vice-consul, no notarial certificate was re-

(1) 2 D. M. & G. 963.

quired. Then the Act 18 & 19 Vict. c. 42, ss. 1, 2, 3, provides that British consuls or vice-consuls may take affidavits abroad, which are receivable in evidence before any Court of law without proof of seal, or signature, or official character; and the 135th section of the Bankruptcy Act, 1883, enacts that an affidavit may be sworn abroad "before a magistrate or justice of the peace or other person qualified to administer oaths." A British vice-consul, therefore, being by the Act 18 & 19 Vict. c. 42, a person qualified to administer oaths, the Court is bound under that Act and r. 50 of the Bankruptcy Rules, 1883, to take judicial notice of his seal and signature, and a notarial certificate is unnecessary. The appellant, therefore, is entitled to the order for which he asks.

Muir Mackenzie, for the official receiver. The requirements of the 135th section of the Bankruptcy Act, 1883, have not been complied with. The concluding words of the section expressly require that when an affidavit is sworn abroad the qualification of the person administering the oath must be certified.

F. C. Willis, for the creditors.

CAVE, J. I am of opinion that this proof was wrongly rejected. The Bankruptcy Act, 1883, s. 135, provides that—"Subject to general rules any affidavit to be used in a bankruptcy court may be sworn . . . . in the case of a person who is out of the kingdom of Great Britain and Ireland, before a magistrate or justice of the peace, or other person qualified to administer oaths in the country where he resides (he being certified to be a magistrate or justice of the peace, or qualified as aforesaid, by a British minister, or British consul, or by a notary public.") Now in this case the affidavit was sworn before the British vice-consul at Paris, who by the Act 18 & 19 Vict. c. 42, is a person qualified to administer an oath, and by r. 50 of the Bankruptcy Rules, 1883, this Court is "to take judicial notice of the seal or signature of any person authorized by or under the Act to take affidavits." Therefore, this Court is bound to take judicial notice of this seal and signature, and is bound to know that it is the seal and signature of the British vice-consul at Paris. What more can be required? It is said that there must be a certificate in accordance with the

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IN RE MAGEE. EX PARTE MAGEE.

concluding words of the 135th section. But this is not a case where the qualification is one of which I have no knowledge, and of which I must consequently require to be certified. The qualification here exists by virtue of the Act 18 & 19 Vict. c. 42. I am bound, therefore, to know that the vice-consul is qualified, and I am bound to recognise his seal and signature. If the contention of the official receiver were correct, the vice-consul would himself have to certify that he was a person qualified to administer an oath. The concluding provision of the 135th section seems intended to meet the case where the person qualified to administer the oath is so qualified by foreign law. That is, of course, a matter that one requires to be certified of. But where the affidavit is sworn before a British consul or vice-consul, who is by our statute law qualified to administer oaths, it would be absurd to require a certificate.

I have been also asked to say that under Schedule I., r. 14, the chairman ought not to have rejected the proof, but ought to have marked the proof as objected to, and allowed the creditor to vote. But I am not sure that he was in doubt. The point, at first sight, appeared a good one, and he may well have thought that a certificate was necessary. All I say is that when the chairman of a meeting is in doubt, he should follow the rule. The proper course will be, I think, to give no directions for a new meeting, but to leave the creditor to take his own course. As to the costs, the case is one of some novelty, and I think I ought to allow costs of all parties out of the estate.

Order accordingly.

Solicitors for appellant: *Rundle & Hobrow.*
Solicitor for official receiver: *W. W. Aldridge.*
Solicitors for other parties: *Woulfe & Sons.*

H. L. F.

IN RE ANDREWS. EX PARTE ANDREWS. 1885 Aug. 4.

Bankruptcy—County Court—Judgment Summons for Committal—Transfer to Bankruptcy Court—Receiving Order—Notice to Judgment Debtor—Debtors Act, 1869, *s.* 5—*Bankruptcy Act*, 1883, *s.* 103, *sub-ss.* 4 & 5—*Bankruptcy Rules*, 1885, *r.* 268 (1) (*a*).

When a judgment summons for a committal comes before the judge of a county court, not having jurisdiction in bankruptcy, and he, being of opinion that a receiving order should be made in lieu of a committal, makes an order transferring the matter to the Bankruptcy Court, notice of the subsequent proceedings under the order of transfer must be served on the judgment debtor.

In such a case the Court of Bankruptcy is not bound to act on the opinion of the county court judge, and to make a receiving order as of course, but must exercise its judicial discretion on hearing the case on its merits.

IN December, 1884, Messrs. Gosnell & Co. recovered judgment against G. Andrews, in the City of London Court, and an order was made for payment of the judgment debt by monthly instalments of 30*s.*

On the 7th of June, 1885, G. Andrews was served with a judgment summons issued out of the City of London Small Debts Court, at the suit of Messrs. Gosnell & Co., to shew cause why he did not pay 5*l.* 15*s.*, the balance due to them on their judgment. On the 20th of June the summons came before Mr. Commissioner Kerr, who being of opinion that a receiving order ought to be made in lieu of committal, ordered that the summons and all further proceedings thereunder should, pursuant to rule 268 (1) (*a*), of the Additional Rules in Bankruptcy of March, 1885, be transferred to the Bankruptcy Division of the High Court.

On the 16th of July, Smith, J., sitting for Cave, J., heard the summons on the application of Messrs. Gosnell & Co., and, acting on the expressed opinion of Mr. Commissioner Kerr, made a receiving order against G. Andrews as a matter of course, and without going into the merits of the case.

No notice of the application to Smith, J., was given to or served on G. Andrews, who now applied for an order to rescind the receiving order.

H. Reed, for the motion. Under s. 103, sub-s. 5 of the Bankruptcy Act, 1883, there is no power in any Court not having jurisdiction in bankruptcy, to act under the section. But by

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IN RE ANDREWS. EX PARTE ANDREWS.

rule 268 (1) (*a*), of the Bankruptcy Rules, 1885, a Court not having jurisdiction in bankruptcy, can, if it thinks a receiving order should be made, transfer a judgment summons to a Court of Bankruptcy. But this does not give the Court transferring the matter jurisdiction to make a receiving order; and the fact that the matter is transferred to a Bankruptcy Court does not give that Court a mere ministerial act to perform, or oblige it to make a receiving order. The transfer merely gives this Court seisin of the matter, and under sub-s. 5 of the 103rd section it has a discretion to exercise. The words are "the Court may, if it thinks fit," make a receiving order. It must therefore hear the case on its merits. Such a proceeding is of the utmost importance to the debtor, and notice of it ought to be served upon him in the usual way, or he might be adjudicated bankrupt behind his back.

S. Woolf, for the judgment creditor. The effect of the section and the rule is that on such a transfer this Court has a purely ministerial act to do. All that is required is the consent of the judgment creditor and the payment of the prescribed fee, both of which were obtained. The debtor has nothing to do with the matter, his consent is not required. There is no rule which prescribes notice or service of these proceedings on the debtor. When a judgment debtor is served with such a summons in the first instance, he must be taken to know that, if he does not pay or appear, he runs the risk of having a receiving order made against him. The usual practice under the rule has been followed. In *Ex parte May* (1) it was held that a transfer of proceedings under s. 125 of the Bankruptcy Act, 1883, can be made on the ex parte application of a creditor.

No reply was called for.

CAVE, J. It seems to me that when a judgment summons has been transferred by the judge of a court, not having jurisdiction in bankruptcy, to this Court, the proper course is to obtain an appointment for the hearing of the case and that it should go into the general list of judgment summonses, and notice of the appointment should be given to the judgment debtor. I think the intention of the legislature was, and the effect of the Act and

(1) 13 Q. B. D. 552.

of the Rules is, to treat the summons, when transferred, as a summons originating in this Court; and then this Court has not a mere ministerial act to perform, but a judicial discretion to exercise and to decide whether a receiving order shall be made or not. Of course a conflict of opinion will sometimes arise between this Court and the county court, and this Court may come to a decision different to that of the county court. But this Court is the Court to exercise its discretion in the matter and not the county court, and it follows that this Court has not to carry out, as a mere ministerial act, the order of the county court. If it were so, any Court not having jurisdiction in bankruptcy might, by transferring a judgment summons in this manner, in effect make a receiving order, and a judgment debtor might find himself adjudicated a bankrupt behind his back. The case of *Ex parte May* (1) is clearly distinguishable from the present. In that case the Court of first instance had jurisdiction to make and had made an administration order. The debtor's estate was already in course of administration by legal process, and then the proceedings were transferred to a Bankruptcy Court. Here the debtor's estate was not being administered under any legal process, and the Court of first instance had only jurisdiction to transfer the hearing of the judgment summons to this Court, and it is for this Court to decide whether the debtor shall be adjudicated bankrupt. As I have said, the proper course is to obtain an appointment for the hearing of the summons when transferred, and notice of the appointment should be given to the debtor in order that he may have an opportunity of appearing and being heard on the summons. I am therefore of opinion that this receiving order must be rescinded, and the summons must go into the list to be heard on its merits.

Order accordingly.

Solicitors: *H. C. Knight; S. M. & J. B. Benson.*

(1) 13 Q. B. D. 552.

H. L. F.

NOTE.—The judgment summons in this case was heard by Cave, J., on the 8th of August, when his Lordship declined to make a receiving order, but made an order for the committal of the judgment creditor.

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July 17.

[IN THE COURT OF APPEAL.]

EX PARTE SHEAD. IN RE MUNDY.

Bankruptcy—Appeal—Preliminary Objection—Notice—Costs.

The solicitor of a respondent, if he is aware of a preliminary objection to an appeal, ought, as a matter of courtesy, to inform his opponent of it without delay, but the omission to do so is not, if the appeal is dismissed on the preliminary objection, a sufficient reason for depriving the respondent of the costs of the appeal.

In re Speight (13 Q. B. D. 42), and *Ex parte Blease* (14 Q. B. D. 123) not followed.

APPEAL from a judgment of Cave, J., dismissing an appeal from the Brighton County Court.

The judgment of Cave, J., was pronounced on the 22nd of May, 1885; the notice of appeal was not served until the 13th of June, more than twenty-one days after the judgment.

Cooper Willis, Q.C., and *A. C. Nicoll*, for the appellant.

Wace, for the respondent, objected that the appeal was out of time: Rules of Supreme Court, 1883, Order LVIII., rules 9, 15; Bankruptcy Rules, 1883, rules 112, 116.

Cooper Willis, Q.C. The appeal should be dismissed without costs, because the respondent did not give immediate notice of his intention to raise this preliminary objection. Notice was given, but not until after counsels' briefs on the appeal had been delivered. This course as to costs was adopted by Cave, J., under similar circumstances in *In re Speight* (1), and by Mathew and Cave, JJ., in *Ex parte Blease.* (2)

BRETT, M.R. I agree with Cave, J., to this extent, that, as a matter of professional courtesy, a solicitor, who knows of a preliminary objection to an appeal which he intends to raise, ought to inform his opponent of it without delay. But the omission to do this is not a sufficient ground for depriving the respondent of the costs of the appeal. The appeal will be dismissed with costs.

BAGGALLAY, L.J., and FRY, L.J., concurred.

Solicitors for appellant: *Deacon, Son, & Gibson.*

Solicitors for respondent: *Loxdale & Jones.*

(1) 13 Q. B. D. 42. (2) 14 Q. B. D. 123.

W. L. C.

[IN THE COURT OF APPEAL.]

1885
July 23.

THE QUEEN ON THE PROSECUTION OF THE GUARDIANS OF THE POOR OF THE EDMONTON UNION *v.* THE GUARDIANS OF THE POOR OF ST. MARY, ISLINGTON.

*Poor Law—Removal—Derivative Settlement—Paupers above Sixteen—*39 *&* 40 *Vict. c.* 61 (*Divided Parishes Act*, 1876), *s.* 35.

APPEAL from order of Divisional Court quashing order of sessions. (1)

Jelf, Q.C., and *Poland*, for the appellants.

McIntyre, Q.C., and *Beasley* (*Tickell* with them), for the respondents.

THE COURT (Brett, M.R., and Baggallay and Fry, L.JJ.), without fully hearing the counsel for the appellants, dismissed the appeal on the ground that the case was governed by the decision in *Reg.* v. *Guardians of Bridgnorth* (2), and that the Court could not entertain the present case without overruling that decision.

Appeal dismissed.

Solicitor for appellants: *F. Shelton.*

Solicitor for respondents: *William Lewis.*

(1) Ante, p. 95.

(2) 11 Q. B. D. 314.

W. P.

1885
July 17.

[IN THE COURT OF APPEAL.]

EX PARTE MARSH. IN RE MARSH.

Bankruptcy—Costs—Taxation—Costs of Taxation—Solicitor to Trustee in Bankruptcy—6 & 7 Vict. c. 73, ss. 37, 38, 39.

Under an ordinary reference to tax the costs of the solicitor to a trustee in bankruptcy the taxation is regulated by the practice of the Court of Bankruptcy, and the provisions of the Act 6 & 7 Vict. c. 73, have no application.

There is no rule in the Court of Bankruptcy that, if on such a taxation the amount of the solicitor's bill is reduced by more than one-sixth, he is to pay the costs of the taxation.

APPEAL from an order of Mr. Registrar Murray.

Mr. A. E. Rosenthal was the solicitor to the trustee in this bankruptcy, and Messrs. Radcliffe, Cator, & Martineau were also employed by the trustee as solicitors in some special business. Orders were made for the taxation of their bills of costs respectively. No special orders of reference were made, but the taxations were ordinary taxations. The wife of the bankrupt, who had been admitted as a creditor upon his estate, obtained an order giving her leave to attend the taxation, and she attended by her solicitor. The bill of Mr. Rosenthal as carried in for taxation amounted to 257*l.* 17*s.* 9*d.*, and that of Messrs. Radcliffe & Co. to 133*l.* 14*s.* 6*d.* In the former case 91*l.* 14*s.* 11*d.*, and in the latter 25*l.* 4*s.* 8*d.*, was taxed off. In each case the bill was reduced by more than one-sixth. Mrs. Marsh then applied to the Court for an order that under these circumstances Rosenthal and Radcliffe & Co. respectively might be ordered to pay the costs of the taxation.

The Registrar refused the application. In delivering judgment he said, "This application is novel and unprecedented, unknown in the taxing master's office so far as regards the taxation of bills of solicitors of trustees in bankruptcy, and none the less novel and unprecedented because the application happens to be made, not by the trustee himself, but by a creditor of the bankrupt.

"The application is one which is altogether outside the provisions of the Act 6 & 7 Vict. c. 73, and must be governed by the

practice obtaining in the Court of Bankruptcy. The cases which have been cited by Mr. Kimber, the most recent of which is over fifty years old, were all cases in which orders of reference were made at the instance of the assignees of the parties chargeable, and they no doubt shew that in those days there was a practice under which, by analogy to the practice in the Courts of Westminster Hall, the costs of a taxation were ordered to be paid according to the result of the taxation. But in those days there were no Rules of Court as regards such taxations, nor in fact was there any taxing master's department in bankruptcy, and it is curious to trace back the position of things in regard to these taxations, which I have done shortly with the very able assistance of Mr. Duncan Stewart, one of the taxing masters of this Court.

"The application is, in my opinion, misconceived and untenable, and it must be dismissed with costs."

Mrs. Marsh appealed.

Woodfall, for the appellant. The provisions of the Solicitors Act (6 & 7 Vict. c. 73), ss. 37, 38, and 39, apply. The appellant is in the position of a third party who is liable to pay the costs, she being interested in the estate. The trustee is a trustee within the meaning of s. 39. The trustee is chargeable with the bill, but the creditors are liable to pay it. More than one-sixth having been taxed off the bills, the solicitors ought to pay the costs of the taxation. In *Ex parte Fosbrooke* (1) one of three co-assignees in bankruptcy, in opposition to the wishes of the other two assignees, procured the taxation of the bill of costs of the solicitor to the assignees, and succeeded in reducing it by more than one-sixth, and it was held that he was entitled to have his extra costs of the taxation, as between solicitor and client, paid out of the bankrupt's estate, the costs of the taxation as between party and party having been paid by the solicitor.

F. Cooper Willis, and *L. H. Rosenthal*, for the solicitors, were not heard.

BRETT, M.R. A trustee in bankruptcy is not one of the parties mentioned in any of the sections of the Act 6 & 7 Vict. c. 73,

(1) 5 Jur. 370.

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EX PARTE MARSH.
IN RE MARSH.

which have been referred to, as entitled to make such an application.

BAGGALLAY, L.J., concurred.

FRY, L.J. It appears from the judgment of the Registrar that such an order as is asked for would be inconsistent with the practice which has existed in the Court of Bankruptcy for the last fifty years. Before we can alter the Registrar's decision, we must be satisfied that he is wrong as to the practice. The appeal must be dismissed.

Solicitors: *E. Kimber; Radcliffe, Cator, & Martineau; A. E. Rosenthal.*

W. L. C.

June 10.

WAYE *v.* THOMPSON.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55) *s.* 117—*Unwholesome Meat—Condemnation by Justice—Proceedings for Penalty—Evidence of State of Meat.*

When unwholesome meat has been condemned by a justice, and proceedings are afterwards taken before a court of summary jurisdiction, under 38 & 39 Vict. c. 55 (Public Health Act, 1875), s. 117, against the owner of the meat, evidence may be given by him as to the state of the meat at the time of condemnation.

CASE stated by justices under 20 & 21 Vict. c. 43, on the hearing at petty sessions of an information preferred by the appellant, an inspector of nuisances, against the respondent, a butcher, under 38 & 39 Vict. c. 55, s. 117.

Upon the hearing (1) the following facts were proved, viz.: That the meat was in the possession of and exposed for sale by the respondent, and was intended for the use of man, that it was seized by the appellant on the 21st of October, 1884, and on the same day taken before Thomas Barlow Mafsicks, Esq., a justice of the peace, and it appearing to him on an ex parte statement not on oath that such meat was diseased, unsound, unwholesome, and

(1) It was stated by counsel during argument that a summons had issued against the respondent calling on him to shew cause why the penalty or punishment under s. 117 should not be inflicted.

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unfit for the food of man, he did thereby condemn the meat, and ordered the same to be destroyed or so disposed of to prevent the same from being exposed for sale or used for the food of man. On the following day, however, the said justice, at the request of the respondent, directed the appellant not to destroy the carcase of meat until the owner could have it inspected by a veterinary surgeon, which inspection was accordingly made by witnesses on respondent's behalf.

The appellant called witnesses to prove that the meat was diseased, unsound, unwholesome, and unfit for the food of man. The respondent thereupon proposed to call the witnesses who by the permission of the said justice had inspected the meat on his, the respondent's, behalf, and also other witnesses, some of whom had seen the cow before it was slaughtered and after it had been dressed, and others who had seen other portions of the carcase of the cow from which the alleged diseased meat had been cut, some before and others after the same had been condemned by the said justice (including medical and veterinary men) and other witnesses who alleged they had partaken of meat from the same animal. This testimony was objected to by the appellant on the following grounds:—

1. That the question of the meat being diseased, unsound, unwholesome, and unfit for the food of man, had been already adjudicated upon and decided in the affirmative by a justice of the peace on an ex parte proceeding, evidence of which had been presented to the justices.

2. The evidence to the contrary should not be admitted by the justices.

3. That the evidence furnished to them by the appellant was sufficient to justify a conviction of the respondent under the 117th section of the Public Health Act, 1875, for the offences alleged against him.

The justices overruled the objections and heard the evidence of the defendant's witnesses, which satisfied the justices that the meat was not diseased, but was wholesome, sound, and fit for the food of man, and the justices gave their decision against the appellant, and ordered him to pay the respondent's costs.

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The question upon which this case was stated for the opinion of the Court was whether the justices should have permitted evidence to be given by the respondent as to the state and condition of the said meat at the time it was ordered to be destroyed by the said Thomas Barlow Mafsicks.

Vesey Fitzgerald, for the appellant. The evidence was inadmissible. By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 116, the inspector of nuisances may inspect any meat exposed for sale and intended for the food of man, and if such meat appears to such inspector to be diseased, or unsound, or unwholesome, or unfit for the food of man, he may seize and carry away the same in order to have the same dealt with by a justice, and, by s. 117, if it appears to the justice that any meat so seized is diseased, &c., he shall condemn the same, and the person to whom the same belongs shall be liable to a penalty not exceeding 20*l.* for every piece of meat so condemned, or, at the discretion of the justice, without the infliction of a fine, to imprisonment for a term of not more than three months.

The petty sessions as a court of summary jurisdiction is not a Court of Appeal to review the decision of the justice, who decides that the meat is bad. This decision is conclusive of the unsoundness; it is not even necessary that he should give the owner an opportunity of being heard: *White* v. *Redfern* (1); as the Court pointed out in that case, there is nothing in s. 117 to lead to the conclusion that the magistrate condemning the meat is to hear anybody. The owner, if afterwards proceeded against, may shew that the meat was not exposed for sale or intended for the food of man, but the condition of the meat is res judicata.

In *Vintner* v. *Hind* (2), where meat having been seized on the premises of a customer, the Court held that the butcher who had sold it could not be convicted under s. 117: Stephen, J., said: "Suppose there had been a regular seizure under s. 116, and a regular condemnation by a justice under s. 117, and that then the person to whom the meat belonged had been summoned before the justices, could he have been heard to say on that summons that the meat was not in fact unsound? It appears to us that he

(1) 5 Q. B. D. 15. (2) 10 Q. B. D. 63, at p. 70.

could not, for the discretion of the justice on that is to be taken to be conclusive."

The provision in s. 117 first appears in 10 & 11 Vict. c. 34 (Towns Improvement Act, 1847), s. 131.

[MATHEW, J.:—If that section had been exactly repeated no question could arise, but the insertion of the words "so condemned" in 38 & 39 Vict. c. 55, s. 117, enables you to argue that the condemnation of the meat is a judgment in rem. Are not those words, however, merely descriptive of the subject matter of the condemnation?].

The 18 & 19 Vict. c. 121 (Nuisances Removal Act, 1855), s. 26, contains a similar provision that meat unfit for food may be seized, and a justice may order such meat to be destroyed, and the person "in whose custody the same is found," shall be liable to a penalty for every piece of meat "so found." The Public Health Act, 1875, s. 117, expands that provision, and uses the words "so seized" and "so condemned."

A. Henry, for the respondent, was not called upon.

MANISTY, J. (after stating the facts as they appeared in the case). The information laid was no doubt the groundwork of a summons, and we are told that the practice is to issue a summons calling on the respondent to shew cause why he should not be sent to prison or fined. On the hearing of that matter—and not of the information as alleged in the case, which is imperfectly stated—the magistrates were called upon to decide whether or not the meat was fit for human food, and the question is, whether they were justified in admitting the evidence as to the state of the meat.

The cases of *White* v. *Redfern* (1) and *Vintner* v. *Hind* (2) do not assist us. *White* v. *Redfern* (1) decides that a justice may, without hearing evidence on behalf of the butcher, condemn the meat, but that does not help us in the present question, viz., when a man is in peril of being sent to prison or fined, is he to be heard or not? It is contrary to first principles to say that a man can be sent to prison or convicted without being heard. The respondent was not heard, and it was not necessary that he

(1) 5 Q. B. D. 15. (2) 10 Q. B. D. 63.

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should be heard, when the case was before the magistrate in the first instance. That magistrate was satisfied that it was made to appear to him the meat was diseased and he condemned it. If the respondent is not allowed to give evidence when summoned to shew cause why he should not be sent to prison or fined, he has not an opportunity of being heard at all, and it would be the first case I ever knew of a man being subject to imprisonment or fine, without having been heard. I am clearly of opinion that the magistrates were right in receiving the evidence.

MATHEW, J. I am of the same opinion. The object of the section was to prevent the sale of meat unfit for human food, and the legislature secure that object by rendering the exposure of unwholesome meat for sale the subject of a criminal charge. The Act directs that a court of summary jurisdiction shall deal with that question, and that implies that the Court shall hear evidence in the ordinary way as to whether the offence has been committed. Such is the general scheme of the legislation. But counsel for the appellant was justified in calling our attention to the precise terms of the Act, and the use of the words "so condemned." The question is whether those words are descriptive of the article or descriptive of the offence. Mr. Vesey Fitzgerald says that they are descriptive of the offence, and the offence that the respondent was charged with was exposing for sale an article which the inspector had seized and a magistrate had condemned as unfit for human food. It is a harsh construction to say the magistrates may convict the owner without giving him an opportunity of being heard. I cannot think the legislature intended to create such an offence, and that a man may be sent to prison for three months for the misfortune of having in his shop a piece of meat which the sanitary inspector was mistaken in supposing to be unfit for human food. The result of the evidence in this case was that the magistrates found the sanitary inspector to have been mistaken, and they were bound to pronounce the decision they did.

WILLS, J. I am of the same opinion. This legislation, as Mr. Vesey Fitzgerald has pointed out, is not new. The identical

clause with nothing but verbal alteration, will be found in 26 & 27 Vict. c. 117, passed in 1863. So for more than twenty years this legislation has been enforced, and it is now discovered that the meaning of it is that a man may be sent to prison for three months without the infliction of a fine under a Public Health Act without being heard. Of course if the Act had so ordained, it must be upheld. But so striking an innovation of English law is not to be assumed, and the only ground for assuming it is a highly technical construction of an inartificially drawn clause. No authority is cited for it. *White* v. *Redfern* (1) gives no colour for the suggested interpretation of the statute, and the Court expressly said that in this part of the enactment the respondent was to be summoned and proceeded against in the ordinary way. True there is a dictum of Stephen, J., in *Vintner* v. *Hind* (2) to the effect that in such proceeding as that now in question it is not open to the defendant to contest the fact of the meat having been unfit for food; but that expression of opinion was unnecessary for the decision of the case, and—the point not arising—without any adequate appreciation of the consequence of so deciding. It has been already decided that the defendant cannot be heard on the application to condemn the meat, and if he could not be heard afterwards he could not be heard at all. The statement of the proposition is its own refutation.

Judgment for respondent.

Solicitor for appellant: *Windybank.*
Solicitors for respondent: *Helder & Roberts.*

(1) 5 Q. B. D. 15.

(2) 10 Q. B. D. 63, at p. 70.

J. R.

1885
April 30.

IN RE WALTER SIMMONS.

Solicitor—Unqualified Practitioner—Acting as a Solicitor—Attachment for Contempt—6 & 7 Vict. c. 73, s. 2—23 & 24 Vict. c. 127, s. 26.

Every person who acts as a solicitor contrary to s. 2 of 6 & 7 Vict. c. 73, is liable to attachment for contempt of Court under 23 & 24 Vict. c. 127, s. 26, whether he so acts in the name of any other person or in his own name, unless such person be duly qualified.

Although the Court will generally adopt the findings of the master as to such conduct, his report is not conclusive.

MOTION in pursuance of notice on behalf of the Incorporated Law Society for an order that a writ of attachment do issue against Walter Simmons for a contempt of Court under 23 & 24 Vict. c. 127, s. 26, in having acted as a solicitor in the name of Harry Kirkby, a solicitor of the Supreme Court, contrary to s. 2 of 6 & 7 Vict. c. 73.

Pursuant to an order of Court a master heard counsel and witnesses in the case, and made his report as follows, viz.: that one David Evans, in August, 1883, was the holder of a bill of exchange for 40*l.*, which was accepted by one Charles Williams, and at which time Charles Williams was liable to pay the amount to David Evans, and as such holder of the bill he went on the 1st of September, 1883, to Walter Simmons to sue out a writ to recover the amount of bill, and Walter Simmons on that day sued out a writ at the suit of David Evans against Charles Williams to recover the amount of the bill in the name of one Harry Kirkby, and then so carried on the proceedings in this Court up to and until the 6th of September, 1883, when Charles Williams agreed to settle the suit with Walter Simmons on certain terms then agreed to. I have further to report that Walter Simmons sued out the writ and commenced and carried on the proceedings in this Court in the name of the said Harry Kirkby without the authority of the said Harry Kirkby, and during the period in which the proceedings were so carried on Walter Simmons was not duly qualified to act as a solicitor. I have further to report that at the time Walter Simmons so issued the writ in the name of Harry Kirkby, Walter Simmons knew

that Harry Kirkby had not a certificate to practise as a solicitor of this Court.

Affidavits were filed and referred to.

R. T. Reid, Q.C., and *Hollams*, for the Incorporated Law Society, in support of the motion. The Court will accept the findings in the report of the master as conclusive: *In re Wright.* (1) He has found that Simmons sued out the writ in the name of Kirkby, and without his authority, and without being a qualified practitioner.

By 6 & 7 Vict. c. 73, s. 2, no person shall act as a solicitor or as such solicitor sue out any writ, or commence, carry on, solicit or defend any action in the name of any other person, or in his own name, unless such person shall be admitted and enrolled, and otherwise duly qualified. If he did so, the offence was deemed a contempt of Court: s. 35. That section prescribing this penalty has been repealed, but is re-enacted in 23 & 24 Vict. c. 127, s. 26, which provides that every person who acts as a solicitor contrary to the enactment in s. 2 of the first mentioned Act, or who in his own name, or in the name of any other person, in anywise acts as a proctor in or with respect to any proceeding in the Court of Probate or the Court for Divorce and Matrimonial Causes without being duly qualified so to act shall be deemed guilty of a contempt of Court.

The provision as to acting as a proctor was added to that for which this section is substituted, because of the creation of the Court of Probate and Divorce subsequently to the passing of the former Act.

[GROVE, J. The master lays before us the record of a case on the 4th of July, 1881, long after the repeal of s. 35, where a writ of attachment issued against one Hunt for having acted as a solicitor in the name of one Cotton a solicitor. There was an express decision that Hunt was guilty of contempt; and there the solicitor Cotton had a certificate.]

Scarlett, shewed cause. Simmons might no doubt have been liable under s. 35 of 6 & 7 Vict. c. 73, if it still existed. But the notice of motion alleges a contempt of Court under s. 26

(1) 12 C. B. (N.S.) 705.

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"in having acted as a solicitor in the name of Harry Kirkby," a solicitor, contrary to s. 2 of 6 & 7 Vict. c. 73. Sect. 26, however, states no such offence. The Act of 1843, s. 2, deals with two offences; first, acting as a solicitor; secondly, taking certain proceedings. 23 & 24 Vict. c. 127, s. 26, deals only with the first, "every person who acts as a solicitor contrary to s. 2," that is, without being duly qualified. There is now no provision to meet such a case as the present, where a man in effect says that he is not a solicitor but is acting for a certain solicitor.

The finding of the master that Simmons knew that Kirkby was not a solicitor is *ultrà vires*. That question was not referred to the master.

The report is not conclusive. The Court will examine the affidavit: *In the Matter of King*. (1)

The one act charged against Simmons is issuing the writ. He must have had the authority of Kirkby at that time, or a subsequent undertaking which he gave for the removal of Kirkby's name from the door would not have been required. They were evidently connected together.

Reid, Q.C., replied. If the contention for Simmons is correct any one can act as a solicitor by abstaining from a representation that he himself is one, and calling himself clerk to a solicitor, certificated or not, real or non-existent.

In *In re King* (1) the case arose on 22 Geo. 2, c. 46, s. 11.

GROVE, J. Application is made to us under s. 26 of the 23 & 24 Vict. c. 127, to grant an attachment for contempt against one Simmons, who is alleged in the notice of motion to have acted as a solicitor in the name of Harry Kirkby, a solicitor of the Supreme Court, contrary to s. 2 of 6 & 7 Vict. c. 73.

The main points that have been taken before us, are, first, that the sections to which I have referred do not apply; and, secondly, that we are not bound to adopt the master's report, and that, upon the examination of the evidence, his report is virtually against evidence, the finding is erroneous, and the Court should not adopt it. Upon the second question, perhaps, it is better to say at once that, although there is direct authority to shew that the

(1) 1 Ad. & E. 560.

Court will generally accept the master's report, and although that rule is scarcely ever departed from, and I do not recollect ever going into the truth or falsehood of the evidence given before a master, still I know of no rule which prevents the Court entering into such a matter, and if the party charged can shew that there is something which is manifestly wrong in the master's report, the Court is certainly not bound to adopt it, because, otherwise, the report of the master would virtually amount to a judgment of the Court on the facts, and all that would be left to the Court would be, where it was open to them to give different degrees of punishment, to give the judgment of the Court, and, so to speak, pass the sentence which they think fit, assuming the master's report, as of course, to be true. I do not think that can be the law. In my opinion, if a case is presented to the Court they should enter upon it, and, if they think that the master is manifestly wrong, say so, and act upon their opinion; for the report is only to assist the Court, and is like the finding of an official referee, who has to find the facts, and whose finding on the facts, as a rule, except upon very strong evidence, the Court does not disturb.

The notice, following the words of the section of the Act to which I have referred, alleged that Simmons "acted as a solicitor in the name of Kirkby contrary to the enactment in s. 2 of 6 & 7 Vict. c. 73." That notice covers both findings of the master, viz., that Simmons acted as a solicitor contrary to the enactment of s. 2, whether he acted in the name of a solicitor without the authority of that solicitor, the person being really a solicitor, or whether he acted in the name of a person who was not a solicitor, or who was, as in this case, a solicitor who had no power to act, not having taken out a certificate. Upon this, as I have said, two points were argued, first, that the so acting by Simmons is not within s. 26 of 23 & 24 Vict. c. 127, and that there is no other section within which it can come. The words of the 26th section of 23 & 24 Vict. c. 127, are these: "Every person who acts as an attorney or solicitor contrary to the enactment in s. 2 of the first hereinbefore mentioned Act, or who in his own name, or in the name of any other person, in anywise acts as a proctor in or with respect to any proceeding in the

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Court of Probate or the Court for Divorce or Matrimonial causes, without being duly qualified so to act, shall be deemed guilty of a contempt of the Court in which the action, suit, cause, matter, or proceeding in relation to which he so acts is brought." It is argued that here there are two things: first, a "person who acts as a solicitor contrary to the enactment in section two." Mr. Scarlett contends that this means one who acts purporting to be a solicitor, calling himself, or acting in such a manner that he represents himself to be a solicitor; and the learned counsel says this must be so, because the second branch of the enactment "who in his own name or in the name of any other person in anywise acts as a proctor," does not say "in anywise acts as a *solicitor* or proctor," and that therefore this Act only applies to a man purporting or pretending to act as or representing himself to be a solicitor, or acting in his own name or in the name of any other person as a proctor, and certainly that would, at first, appear to be the construction of the statute. But we must read the other words of the section with reference to the circumstances of the case under which Simmons acted. It is not merely a "person who acts as an attorney or solicitor," but "a person who acts as an attorney or solicitor contrary to the enactment in section two of the first hereinbefore mentioned Act." Sect. 2 of the previous Act I will read in a moment, observing in the meantime that there was a s. 35 of the Act of 6 & 7 Vict. c. 73, which would clearly have applied, as, I understand, is admitted, to this case, but which was repealed; it was however virtually re-enacted, although not exactly in the same terms, by this s. 26. The repeal and the re-enactment, I believe, took place at and about the same time, that is, the year 1860.

Therefore, if Simmons can escape through the language of this section, the law at present in England would be in this strange position, that, if a person acts as a solicitor, representing himself by words or by conduct to be a solicitor, and not being a solicitor, he is liable to punishment for contempt of Court; but that if he only chooses to say that he acts in the name of another person, whether that person be a solicitor or not, whether he be a solicitor entitled to practise or not, or whether he be an imaginary person or not, then the person so professing to act in the name of another

can with impunity practise as a solicitor, because he does not, according to the argument, "act as an attorney or solicitor" in his own name, but acts as a deputy solicitor, although the alleged person for whom he acts as deputy may have no existence, or may be a person not a solicitor at all, or may be little more than John Doe or Richard Roe, or nominis umbra. That would be an extraordinary, and, as I think, absurd construction of the Act, and when the Act may be read in two ways, one of which leads to a manifest absurdity, it is very old doctrine that such is not the construction of the Act which the Court will adopt. That doctrine, often repeated by Lord Wensleydale, has been followed recently in the Court of Appeal in a case as to the Public Prosecutor (1), and is well known. This Act may be construed in two ways. It may be construed, as was contended by Mr. Scarlett, to mean "act as a solicitor in his own name," or it may mean "act as a solicitor," in whatever name he acts in, still doing the acts which he does as a solicitor, without being himself a solicitor, or without real authority from a solicitor; not being, so to speak, a managing clerk, who has authority to act given him by a solicitor, but acting entirely without authority, really as a solicitor, but pretending to act in the name of some other person from whom he has no authority.

Let me now turn to s. 2 of 6 & 7 Vict. c. 73, to which s. 26 refers, saying, "Contrary to the enactment in s. 2 of 6 & 7 Vict. c. 73." First, there is an obvious reason—and I think that is not by any means unimportant in construing the Act—for limiting the second part—"who in his own name or in the name of any other person in anywise acts as a proctor." It would be somewhat singular, if we read this section to mean that only a person who acts as a solicitor in his own name is to be subject to punishment as guilty of a contempt of Court, but a person who acts either in his own name or in the name of any other person as a proctor is to be liable. It is just as much a real offence to act in another person's name as solicitor as to act in another person's name as proctor. But if we adopt the other construction of the Act, "As attorney or solicitor contrary to the enactment," in s. 2 of the former Act, it is clear why in the later

(1) *Yates* v. *The Queen*, 14 Q. B. D. 648.

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Act the words "acting in his own name or in the name of any other person as a proctor," are used, viz., because the previous section in the first Act has provided for acting in the name of another person, who is a solicitor, and therefore this second branch of s. 26 is confined to proctor. If so, that is a very strong reason for construing the 26th section of the Act of 23 & 24 Vict. c. 127 and s. 2 of the Act 6 & 7 Vict. c. 73, as applying to a person acting as attorney or solicitor in any way contrary to the enactment in s. 2 of 6 & 7 Vict. By s. 2 it is enacted that "no person shall act as an attorney or solicitor, or as such attorney or solicitor sue out any writ or process, or commence, carry on, solicit, or defend any action, suit, or other proceeding, in the name of any other person, or in his own name, in Her Majesty's High Court," &c. Then it goes on to enumerate the Courts, but it does not mention the Divorce Court. We have all but the bare words, which I will advert to presently, and we have the reason apparently given us for the use of the words, "acting as a proctor in another person's name," because the acting as a solicitor in other courts in another name is dealt with in s. 2. Therefore the apparent absurdity in s. 26 is removed by assuming the words in the beginning of the section, "who acts as an attorney or solicitor contrary to the enactment in s. 2," to refer, not merely to the first sentence, "shall act as an attorney or solicitor," but to all the acts as attorney or solicitor which are comprised in s. 26.

Mr. Scarlett contends, and it is, no doubt, a fair argument, that s. 2 has two branches, first, "acting as an attorney or solicitor," viz., professing to be one; and second, "sue out any writ or process." But it appears to me, although duplicate things are comprised in the section, he may act as an attorney or solicitor in his own name, or he may act as an attorney or solicitor by suing out a writ as an attorney or solicitor would do, if he is acting as an attorney or solicitor in doing so, because the words are "as such attorney or solicitor suing out any writ or process." If the section were read as the learned counsel suggests, there would be no need for nor meaning in the words, "in the name of any other person or in his own name," because the person would, according to both provisions, be acting as an attorney or solicitor, or as such attorney or solicitor suing out any writ or process; and

if the words "in the name of any other person, or in his own name" applied to the second branch, viz., "as such attorney or solicitor sue out any writ or process," it ought to apply to the first, too; therefore, if the construction of Mr. Scarlett is right, before the person can come within the second branch, he also must come within the first, and therefore the second is unnecessary. The obvious construction and the right one is: if he acts as an attorney or solicitor, or not as an attorney or solicitor, and does these things, which there may be very good reason for specifying, viz. sue out a writ, &c., in the name of any other person or in his own name, then, he is within s. 2 of the first Act; and when the 26th section in the second Act says, "act as attorney contrary to the enactment in s. 2," it applies to both these provisions. Otherwise the result would be, not only the misconstruction I have pointed out, but the absurdity that although a man who is weak enough to pretend to be an attorney and solicitor, is liable; yet if he tells a direct falsehood and says, "I act for a person who is an attorney and solicitor," or he acts for a person who is not a solicitor, but whom he represents to be one, or for any other person, and does not act pretending that he himself is a solicitor, he escapes all the provisions of these Acts, and goes with impunity, although the offence is exactly the same, or perhaps worse, because he tells a double falsehood.

The conclusion to which I come appears to me to be a rational mode of reading these sections. But then we find what the Court has itself done. I might mention many cases, but there is one case in which I have had before me the actual order of the Court that was drawn up—that was a case where, the report from Master Manley Smith being read, the Court on hearing Mr. Wills, counsel for the Law Society, and no person appearing for or on behalf of the person, who was a solicitor, it was ordered that a writ of attachment for contempt should issue against the solicitor under 23 & 24 Vict. c. 127, s. 26, in having acted as a solicitor in the name of E. B. Cotton, a solicitor in the High Court carrying on business as Cotton & Co., in a certain action contrary to the enactment in s. 2 of 6 & 7 Vict. c. 73, and it was further ordered that the said writ of attachment should lie in the office for a week. So there is the express authority of the Court, acting on

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this section, s. 26 of 23 & 24 Vict. c. 127, and the 2nd section of the other statute, and finding in fact that the man in question did not act as a solicitor in his own name, or purport to be a solicitor in his own name, but acted in the name of another solicitor who is named in this order, contrary to those sections. If I were of a different opinion I should be bound to follow the judgment of the Divisional Court here, and if wrong it would not be for me but for the Court of Appeal to overrule it. In addition to that case there have been a variety of others in which persons have been punished for acting in this wise, persons who have been either suspended or struck off the roll of solicitors, or who never have been solicitors, acting in the name of other solicitors, real solicitors, who have taken out their certificate; but the Court supposing that the nominal solicitor was a mere dummy, and that the offending persons acted as solicitors, have dealt with them just as they did in this particular case which I am now citing. Therefore it is a clear authority for the construction which I have put upon the sections. If that be true, the present person with whom we are concerned, if the master is right, acts as a solicitor within these Acts, whether he acts for a real solicitor without authority, or whether he acts for a sham solicitor, or, as in this case, for a solicitor who, not having taken out his certificate, has no power to act, and who is virtually, for the present purposes, no solicitor at all; because, of course, if this were to be allowed, supposing the person so acting had authority from a solicitor who had no certificate, it would virtually abolish the necessity of taking out a certificate, and people who are disreputable people, and inclined to evade the duty—could practise without the authority of a real solicitor entitled to act. Both, therefore, come within this section. I am of opinion that Simmons is guilty of both the offences found by the master; that he acted without the authority of the said Harry Kirkby; and that even if Mr. Kirkby gave him his authority, Simmons acted knowing perfectly well that Mr. Kirkby was not a solicitor entitled to act; and that he, Simmons, himself acted as and did the work of a solicitor with that knowledge.

[After referring to the evidence, the learned judge added:] I adopt the report of the master, and I find on that report that

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Simmons acted without authority, and, in any event, that he acted without the authority of a real solicitor empowered to act and to give authority. Therefore Simmons comes within the statute, and under these circumstances I am of opinion that the writ of attachment should issue.

MANISTY, J. The question is whether upon the evidence, coupled with the master's report, we think the case has been made out against Simmons according to the notice of motion, which is rightly founded on s. 26 of 23 & 24 Vict. c. 127, and calls on him to shew cause why an attachment should not issue for a contempt of Court under s. 26 in having acted as a solicitor in the name of Harry Kirkby, one of the solicitors of the Supreme Court. [The learned judge read ss. 26 and 2]. Sect. 2 enacts that no person shall act as a solicitor, or as such solicitor sue out a writ either in his own name or in the name of any other person. A writ was issued by Simmons in fact, though it purported to be issued by Kirkby. Assume for a moment Simmons had no authority to issue that writ in the name of Kirkby, yet Simmons in issuing the writ was doing the act of a solicitor, and came within the terms of s. 2, which, I think, was intended to prohibit a person in reality acting as a solicitor, although apparently he is not acting as a solicitor but as the clerk of a solicitor. On this evidence, apart from the master's report, and looking at the affidavits only, I should have come to the conclusion that Simmons did issue that writ as a solicitor, though apparently he was doing it as clerk to a solicitor. But the case also comes within the other words of the Act, apart from any question of authority, for even if he had Kirkby's authority to issue the writ on the 1st of September, and did then bonâ fide issue it believing Kirkby to be a solicitor qualified to act as a solicitor, Simmons knew that was not so on the 3rd of September, as a letter from him of that date shews. Yet after that he carried on the action, and in the name of Kirkby continued to act as a solicitor. He has to shelter himself by saying that he did it in the name of Kirkby. But he knew he had no authority then from Kirkby, and that Kirkby could not authorize it. [The learned judge referred to the evidence to shew that the action was settled,

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and sums of money received and receipts given by Simmons in the name of Kirkby.] It would be absurd to suppose that the Act meant that a man might escape from it by using the name of a solicitor and then asserting that he himself did not profess to be a solicitor. I think this rule should be granted in the terms of the notice of motion, viz. for an attachment with costs.

Rule absolute.

Solicitor for Incorporated Law Society: *Williamson.*
Solicitor for Simmons: *J. B. Barrett.*

J. R.

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Nov. 13.

[IN THE COURT OF APPEAL.]

THE SHEFFIELD AND SOUTH YORKSHIRE PERMANENT BENEFIT BUILDING SOCIETY *v.* HARRISON.

Fixtures—Mortgagor and Mortgagee—Driving-belts—Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36).

A wheel-factory, including the machinery and gear, was mortgaged to the plaintiffs. The deed of mortgage was not registered as a bill of sale. Leathern driving-belts were used in working the machinery at the factory; they were fastened to certain wheels or drums, but could be removed at pleasure when the machinery was thrown out of gear. They were necessary parts of the machinery. The mortgagor having liquidated his affairs under the Bankruptcy Act 1869, the defendant, his trustee, sold the belts:—

Held, that the belts passed to the plaintiffs under the mortgage and that they were entitled to maintain an action of conversion against the defendant.

Longbottom v *Berry* (Law Rep. 5 Q. B. 123) approved.

ACTION against the defendant as trustee under the liquidation proceedings of Henry Hughes, for wrongfully depriving the plaintiffs of certain goods, to wit, seventy-two driving-belts.

The cause came on for trial before Field, J., at the Winter Assizes, 1884, held at Leeds, for the West Riding of Yorkshire, when the following facts were proved:—

The plaintiffs were a building society duly incorporated under the Building Societies Act, 1874. In December, 1875, A. R. Robinson and H. Hughes were the owners in fee of certain land and premises known as the Mersey Wheel Works, Nottingham Road, Derby, and carried on business as wheel manufacturers. By an indenture dated the 31st of December, 1875, A. R. Robin-

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son and H. Hughes, in consideration of the sum of 12,000*l.*, advanced to them by the plaintiffs, conveyed to the plaintiffs the said land and premises, and the works thereon, and all the engines, plant, machinery, and gear described in a schedule to the said indenture, and also all the engines, plant, machinery, and gear, which then were or might thereafter be affixed to the said land or premises, subject to a proviso for the redemption of the premises on the terms stated in the said indenture. The deed contained a power to the plaintiffs "to enter into possession or receipt of the rents and profits of the said premises;" and also a power "to demise the said premises or any part thereof for the purpose of occupation or otherwise for any term not exceeding twenty-one years in possession;" and also a power "absolutely to sell the said premises or any part thereof by public auction or private contract, at such time, subject to such conditions, and generally in such manner as the" plaintiffs "may deem expedient, with liberty to buy in the said premises or any part thereof, or to rescind or vary gratuitously or upon terms any contract for sale, and to resell, without being responsible for any loss occasioned thereby." The second schedule annexed to the deed comprised machinery and gear, &c., and included "seventy-two driving-belts." This indenture was not registered as a bill of sale. The belts were used in working the main and counter shafting of the machinery fixed at the works. The mode of fixing main and counter shafting was by having iron bearers cast on the pillars of the mill or otherwise fixed or annexed in some other permanent way to the building. An iron socket was annexed to the bearer; upon this socket the shaft was placed; a metal cap was put over the shaft and screwed to the bearer. The cap kept the shaft in its place, and the shaft could not be removed without taking off the cap; but when the cap was taken off, the shafting could be removed also and was independent of either the bearer or the building. The cap could be removed without injuring or displacing the bearer. The counter shafting was made lighter than the main shafting, ran parallel with it, and was worked by means of leathern belts or bands, which being made to pass over both shafts communicated a rotary motion from the main to the counter. On these shafts there were broad hollow wheels called drums, and over these

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drums leathern belts or bands were passed, which were also passed over a drum or wheel attached to each machine, thereby communicating to it the desired motion. These belts or bands varied from about two to six inches in breadth, and were bought from curriers in undivided lengths. The belt or band before being put together was passed over the drums before-mentioned and drawn tight. The two ends were rivetted or laced together with metal rivets or leathern laces. The belts or bands, when so joined, could be slipped off the drum of the shaft and the wheels of the machine at pleasure, and with very little pressure, when the machine and shafts were not in motion, and they could be removed from the shafting altogether by being unrivetted or unlaced. Belts or bands, similar to those to which this action related, were not purchased with the machines in connection with which they were used, but were bought separately. But the leathern belting or driving-belts in question in this action were essential and necessary parts of the shafting and machines which they connected, as without them the motion of the shafting could not be imparted to the machinery in the said works, and without them the whole of the machinery would be at a standstill. In July, 1879, A. R. Robinson and H. Hughes dissolved partnership and H. Hughes carried on the business. In August, 1880, the affairs of the said H. Hughes were liquidated by arrangement in pursuance of the Bankruptcy Act, 1869, and the defendant was appointed trustee in the liquidation. The defendant, as trustee in the liquidation, took possession of the belts in question in this action, and sold them by auction for the benefit of the estate. It was agreed that the value of the belts sold by the defendant was 50*l*.

Upon these facts Field, J., was of opinion that *Longbottom* v. *Berry* (1) was not a binding authority, and gave judgment for the defendant.

The plaintiffs appealed.

Waddy, Q.C. (*Wilberforce* with him), for the plaintiffs. By the mortgage to the plaintiffs' company the property in the belts passed: *Longbottom* v. *Berry* (1), which was affirmed in *Holland*

(1) Law Rep. 5 Q. B. 123, at p. 135.

v. *Hodgson* (1). If a thing is necessarily a part of a machine fixed to a building which cannot be worked without it, it is subject to the same conditions and incidents as the machine itself, and passes by the conveyance of the building.

Bosanquet, Q.C., and *Rose Smith*, for the defendant, were called upon to argue. The question is whether the belts were part of the soil. By the Bills of Sale Act, 1854 (which was in force in 1875), all fixtures were to be treated as personal chattels: it may be that part of a machine is a fixture and part is not; and the decision in *Longbottom* v. *Berry* (2) was intended to apply only to the particular facts then before the Court. In each case the question is whether a particular chattel is affixed to the soil, and that is very much a question of fact. It is not proved that the belting could not be used for many other machines of different kinds.

Waddy, Q.C., was not called upon to reply.

BRETT, M.R. This deed did not require to be registered as a bill of sale, unless the belts were treated as, or were in fact, chattels: now it is admitted that the machinery was part of the freehold, for the machinery was so fixed to the freehold as to become part of it. For the plaintiffs it is said that the belts are parts of those machines which were fixed to the freehold, and if they are parts of those machines they are in law fixed to the freehold. The belts are what cause the principal machine to work when it is in gear. When the machine is in gear, the belts are put across the drums: they must be exactly fitted: when the machine is thrown out of gear, the belts remain on the machine. It is merely to move the belts from one part of the machine to another: the belts will not necessarily fit any other machine. It is to a great extent a question of fact and not of law; and it is a question how the law is to be applied to the facts. How is the question dealt with in *Longbottom* v. *Berry*? (2) In the consideration of law the machines are part of the land: every part of the machine is fixed to the land; and these belts were fixed to the machines and were parts of the land; for everything which is a necessary part of the machine is part of the land and passes under the mortgage, and no

(1) Law Rep. 7 C. P. 328. (2) Law Rep. 5 Q. B. 123.

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registration is required. I think that *Longbottom* v. *Berry* (1) was right. The judgment of Field, J., is inconsistent with it; he evidently thought it wrong: it is, however, a decision which must be followed. The learned judge seemed to think that the decision in *Longbottom* v. *Berry* (1) proceeded upon the admitted facts in that case. I decline to follow that view. I think that a principle of law was laid down, which must be observed in subsequent cases.

COTTON, L.J. I am of the same opinion. The judge declined to be bound by the admission of facts in *Longbottom* v. *Berry* (1); but the law is there laid down on the facts admitted, and similar facts are here proved. And the evidence given in this case shews that the facts in that case were true, and the law as laid down on an admitted state of facts is to be followed. This is really within the principle of *Longbottom* v. *Berry* (1); I doubt whether that case ought now to be overruled under any circumstances: it would be serious to depart from it after it has been held to be good law for so many years; but I think that it was right. These belts are not merely pieces of leather, but they were essential parts of certain machines, and these machines were affixed to the freehold. These belts were fitted to the machine, and were only fit to be used with it as part of it; and if the machine was part of the land, these belts were parts of the land. If the belts are essentially parts of the freehold, they passed by a grant of the freehold which carried with it the machine and all the essential parts of it. It is like the case of a key of the door of a house; that passes by the conveyance of the house without any words expressly assigning it, because it is part of that which passes with the land. The decision of Field, J., was wrong, and this appeal must be allowed.

LINDLEY, J. I am of the same opinion. I have no doubt that the deed of mortgage passed these belts to the mortgagees, for they were parts of the machine. But that does not dispose of this case, for at the time of the mortgage the Bills of Sale Act, 1854, was in force. The question is not whether the belts or

(1) Law Rep. 5 Q. B. 123.

machines passed to the mortgagees, but whether the latter acquired a good title under the Bills of Sale Act, 1854. That statute dealt with fixtures; but the answer is that its operation is confined to fixtures capable of being dealt with separately, that is, apart from the land. The deed does not enable the mortgagees to sever them from the land; indeed they could not be severed, they were so fastened as to be part of the land. It appears to me that the Bills of Sale Act, 1854, does not apply to this case. This appeal must be allowed, and judgment must be entered for the plaintiffs for 50*l.*

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Judgment for the plaintiffs.

Solicitor for plaintiffs: *G. Lucas, for Broomhead, Wightman, & Moore, Sheffield.*

Solicitor for defendant: *E. Warriner, for Mole & Stone, Derby.*

J. E. H.

[IN THE COURT OF APPEAL.]

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July 2.

BRIDGER *v.* SAVAGE.

*Principal and Agent—Agent betting for Principal—Action for the Money received—Wagering—*8 *&* 9 *Vict. c.* 109, *s.* 18.

The plaintiff employed the defendant for a commission to make bets for him on horses. The defendant accordingly made such bets, and he received the winnings from the persons with whom he had so betted. In an action by the plaintiff for the amount which the defendant had so received:—

Held, that 8 & 9 Vict. c. 109, s. 18, which makes null and void all contracts by way of wagering, did not apply to the contract between the plaintiff and defendant, and that, therefore, notwithstanding that statute, the plaintiff was entitled to recover in respect of the bets which had been so paid to the defendant.

Beyer v. *Adams* (26 L. J. (Ch.) 841) overruled.

ACTION for 131*l.* 17*s.* 6*d.* as due to the plaintiff on the balance of accounts for money had and received to the use of the plaintiff. The case for the plaintiff was that it was arranged between him and the defendant that the latter, for a commission of 5*l.* per cent. on winnings, was to make bets for the plaintiff by laying money for him on various horses at starting prices, and that he, the defendant, had accordingly done so, and had received 212*l.* 10*s.*

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from the losers, and that on the balance of account in respect of what had been won and lost on the different bets which had been so made there was due the sum claimed in this action, after deducting the defendant's commission. The case for the defendant was that there was no such arrangement as the plaintiff alleged, but that the bets on the horses were made by the plaintiff with the defendant personally, and that as such they were not recoverable at law.

The action was tried in February last before Lord Coleridge, C.J., without a jury, when his Lordship disbelieved the defendant and gave judgment for the plaintiff for the amount claimed.

The defendant appealed.

Grantham, Q.C., and *C. Parsons* (*C. Grant*, with them), for the defendant. The Chief Justice was wrong in the conclusion to which he came upon the facts, for he ought to have believed the evidence of the defendant that the bets were between the plaintiff and himself personally; but assuming the facts to be as the Chief Justice found them, the plaintiff is not entitled in law to recover the amount claimed in this action, which was won in bets on horse races. These bets were contracts by way of gaming or wagering within the meaning of 8 & 9 Vict. c. 109, s. 18, and are made null and void by that Act. *Beyer* v. *Adams* (1) is an express decision of Stuart, V.C., in favour of the defendant's contention. In that case the Vice-Chancellor disallowed in an administration suit the claim of a winner of a bet to be paid out of the assets the amount of such bet, which the loser had placed in the hands of the deceased for the winner. The Vice-Chancellor said it was clearly within the prohibition of the statute, which he said was general, and was not to be confined to proceedings against the loser of the wager. He distinguished it from the cases in which it had been decided that promissory notes given to the winner could be recovered, as in those cases there was a sufficient consideration for the notes; and he then said, "The cases in which it had been held that an agent to whom money had been paid for his principal, could not set up by way of defence to the action by his principal for the

(1) 26 L. J. (Ch.) 841.

money, the illegality of the contract under which the money had been received, were also inapplicable, for the judges who decided those cases were not dealing with the language of a statute which was express."

[BRETT, M.R., referred to *Tenant* v. *Elliott* (1) and *Beeston* v. *Beeston*. (2) The statute does not make the betting illegal. The description of it by Stuart, V.C., is not correct. Is there any other case besides *Beyer* v. *Adams* (3) against this money being recoverable ?]

No; *Read* v. *Anderson* (4) is the converse of the present. The agent was allowed there to recover from his principal what he had paid on bets made for and on behalf of such principal with other persons, but that was on the principle that the agent had been placed by his principal in a position in which he might incur some pecuniary loss, and in respect of that the principal was bound to indemnify him; but there has not been yet any decision that an agent who has received a bet for his principal is bound to hand it over to him, and *Beyer* v. *Adams* (3) is an authority at least the other way. To allow such an action as the present to be maintainable is contrary to the statute, which enacts that no suit shall be maintained for recovering any sum of money won upon any wager.

Kemp, Q.C., and *Gore*, for the plaintiff, were not called upon.

BRETT, M.R. It is impossible to dissent from the Lord Chief Justice on the question of fact. He did not believe the defendant, and therefore the only question which remains to be disposed of is one of law. Now the case is this: the plaintiff employed the defendant to make bets for him, and if he should win on those bets to receive the money payable thereon, and to pay the same over to him, the plaintiff, and the defendant for a consideration, viz., the commission which he charged, agreed to do so. The defendant thereupon made bets on certain horses. It is true that when he won on those bets the persons with whom he made them might not have paid, but they did pay, and therefore after that any dispute as to their validity was gone. The matter therefore

(1) 1 B. & P. 3.
(2) 1 Ex. D. 13.
(3) 26 L. J. (Ch.) 841.
(4) 10 Q. B. D. 100; 13 Q. B. D. 779.

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stands thus—the defendant has received money which he contracted with the plaintiff to hand over to him when he had received it. That is a perfectly legal contract; but for the defendant it has been contended that the statute 8 & 9 Vict. c. 109, s. 18, makes *that* contract illegal. The answer is that it has been held by the Courts on several occasions that the statute applies only to the original contract made between the persons betting, and not to such a contract as was made here between the plaintiff and defendant. In *Tenant* v. *Elliott* (1) Buller, J., says: "Is the man who has paid over money to another's use to dispute the legality of the original consideration? Having once waived the legality, the money shall never come back into his hands again. Can the defendant then in conscience keep the money so paid? For what purpose should he retain it? To whom is he to pay it over; who is entitled to it but the plaintiff?" And Eyre, C.J., adds: "The defendant is not like a stakeholder. The question is, whether he who has received money to another's use on an illegal contract can be allowed to retain it, and that not even at the desire of those who paid it to him? I think he cannot." What can be a more distinct authority than that in support of this action? Then *Johnson* v. *Lansley* (2) applies that doctrine to bets on horse racing, and *Beeston* v. *Beeston* (3) is equally clear. There Pollock, B., says: "The statute is directed against suits brought for recovering on any contract by way of wagering. That applies to actions brought by one party to a wager against the other, or by either party against the stakeholder." The decision in the case of *Read* v. *Anderson* (4) is founded on this, that the contract between the principal and the agent who is employed by him to make bets for him, is not affected by the statute 8 & 9 Vict. c. 109, and is therefore valid. Then the case of *Beyer* v. *Adams* (5) is the only one in favour of the argument which has been urged on behalf of the defendant, and the time has now come when, unless some distinction (which I do not see) can be found between it and the other authorities to which I have referred, that case can no longer stand. In my opinion the deci-

(1) 1 B. & P. 3, at p. 4.
(2) 12 C. B. 468.
(3) 1 Ex. D. 13.
(4) 10 Q. B. D. 100; 13 Q. B. D. 779.
(5) 26 L. J. (Ch.) 841.

sion there was a wrong one, and must be overruled. Its doctrine was well challenged by the case of *Beeston* v. *Beeston*. (1) In that case, which is to be found much more fully reported in 33 L. T. (N.S.) 700, Amphlett, B., cites *Sharp* v. *Taylor* (2), and shews that what was held in *Beyer* v. *Adams* (3) was inconsistent with what Lord Cottenham decided in *Sharp* v. *Taylor* (2), so that *Beyer* v. *Adams* (3) was really overruled before it was decided, and it has never since been acted on or followed.

BAGGALLAY, L.J. I also think that there is no ground for this appeal. With respect to the question of law, the only case which has been brought forward as supporting the contention of the appellant is that of *Beyer* v. *Adams*. (3) Eight years previously to that case was the decision of Lord Cottenham in *Sharp* v. *Taylor* (2), but though many cases were cited in *Beyer* v. *Adams* (3) it does not appear that *Sharp* v. *Taylor* (2) was cited, and I cannot but think that if it had been, Stuart, V.C., would not have come to the conclusion he did. I will only add that Pollock, B., towards the end of his judgment in *Beeston* v. *Beeston* (1) points out that betting was not illegal "at common law, nor by 9 Anne, c. 14, nor 5 & 6 Wm. 4, c. 41, because those statutes only apply to securities between the parties wagering, and the statute 8 & 9 Vict. c. 109, only makes such contracts null and void and not illegal, as is clearly expressed in *Fitch* v. *Jones*." (4)

BOWEN, L.J. I have nothing to add as to the question of fact. As regards the law it appears to me to be clear, both on principle and according to the authorities, that there is no ground for the defence which has been set up in this action. Now with respect to the principle involved in this case, it is to be observed that the original contract of betting is not an illegal one, but only one which is void. If the person who has betted pays his bet, he does nothing wrong; he only waives a benefit which the statute has given to him, and confers a good title to the money on the person to whom he pays it. Therefore when the bet is paid the transaction is completed, and when it is paid to an agent it cannot be

(1) 1 Ex. D. 13.
(2) 2 Phil. 801.
(3) 26 L. J. (Ch.) 841.
(4) 5 E. & B. 238; 24 L. J. (Q.B.) 293.

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contended that it is not a good payment for his principal. If not, how monstrous it would be that the agent who has received money which belongs to his principal, and which he received for his principal, and only on that account, should be allowed to say that the payment was bad and void. The truth is that the contract under which he received the money for his principal is not affected by the collateral contract, under which the money was paid to him. So much, therefore, for the principle governing this case. As to the authorities, the cases of *Sharp* v. *Taylor* (1), *Johnson* v. *Lansley* (2), and *Beeston* v. *Beeston* (3), all go to shew that this action is maintainable, and the only authority the other way is that of *Beyer* v. *Adams* (4), and that case cannot be supported, and is not law.

Appeal dismissed.

Solicitors for plaintiff: *Baker, Blaker, & Co.*

Solicitors for defendant: *Palmer & Bull, for Lamb & Evett, Brighton.*

W. P.

June 12.

[IN THE COURT OF APPEAL.]

TATE & SONS *v.* HYSLOP.

Insurance (Marine)—Craft Risk—Arrangement by Assured to employ a particular Lighterman—Concealment of a Material Fact.

On policies of marine insurance on goods, which included risks on crafts and lighters, underwriters to the knowledge of the plaintiffs charged a higher rate of premium where the insurance was with no recourse against lightermen (which meant where the lighterage was done on the terms that the liability of the lightermen was to be less than that of common carriers, namely, for negligence only), than they charged where there was such recourse and the liability of the lightermen was to be that of common carriers. The plaintiffs effected with the defendant, a Lloyd's underwriter, a policy of marine insurance on goods which included risk on craft and lighters, and was not with no recourse against lightermen. At the time of effecting such policy the plaintiffs had an arrangement with one H., by which he was to do all the plaintiffs' lighterage on the terms that he was only to be liable for negligence:—

Held, that if the plaintiffs intended that the goods so insured should be landed under such arrangement with H., it was a fact which a prudent and

(1) 2 Phil. 801.
(2) 12 C. B. 468.
(3) 1 Ex. D. 13.
(4) 26 L. J. (Ch.) 841.

experienced underwriter would take into consideration in estimating the premium, and that therefore a jury would be justified in finding that the non-communication of it to the defendant was the concealment of a material fact which vitiated the policy.

A mere disclosure of the existence of such arrangement to the defendant's solicitor is not notice of it to the defendant.

ACTION on four open policies of marine insurance effected in July and September, 1882, by the plaintiffs, sugar refiners, in London, with the defendant, a Lloyd's underwriter. By each policy the insurance was on sugar or merchandise, as interest might appear to be thereafter declared, and was in steamer or steamers, "and in boats and lighters while loading and unloading, and until finally delivered at any wharves, docks, landing places, vessels, or refinery at Silvertown, as ordered by the assured." The risks insured included "all risks of transhipment and storage on the route, and of raft, craft, and lighters in loading and unloading, and transhipment, and particularly of any special lighterage, and while in craft waiting shipment or landing, or delivery to other vessels after arrival, and until delivered at any wharves, docks, landing-places, vessels, or elsewhere, as ordered by the assured or their agents, each craft, lighter, or other craft to be considered as separately insured." The loss sought to be recovered in this action occurred whilst the sugar insured was on lighters in the Thames on its way from the steamer, which had brought it to London to the plaintiffs' refinery at Silvertown.

At the trial, which took place before Manisty, J., in December, 1883, the main defence was that the defendant had been induced to become an insurer by the misrepresentation of the plaintiffs and their agents, and by the wrongful and improper concealment by the plaintiffs and their agents of certain material facts known to the plaintiffs and their agents, and unknown to the defendant, and which were material to the risks, and ought to have been communicated by the plaintiffs and their agents to the defendant. The misrepresentation relied on was that there would be a recourse against the lightermen in the event of damage to the goods while in craft, and the concealment was of an agreement between the plaintiffs and Mr. Hooper their lighterman, that the latter should not be liable for any loss in craft except loss caused by his own negligence.

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It appeared that prior to April, 1882, when policies had been effected, including craft risk, and the underwriters had had to pay on losses so occurring whilst the goods were in craft, the underwriters had afterwards sued the lightermen in the name of the assured, and so had recovered back what they had had to pay on the policies. The lightermen found this liability was very serious, and to relieve themselves from it a notice was published in the newspapers by an association of the Thames master lightermen that they would not take upon themselves the responsibility of common carriers, and would only be liable for loss or damage to goods resulting from the negligence or wilful acts of their servants. The underwriters on the other hand came to a resolution at a meeting at Lloyd's on the 11th of May, 1882, "that it would be injurious to mercantile interests to limit the customary liability of lightermen," and they published this with a letter of Lloyd's secretary, calling the attention of underwriters and merchants to the movement which had been so set on foot by master lightermen, and stating that underwriters were entitled to be informed whether lighterage the risk of which they were asked to take was to be done on the old or new terms, so that they might regulate their premiums accordingly. There was evidence that after this the premiums on policies including craft risk were different, the rate being 1*s.* or 2*s.* higher where the insurance was on the terms of no recourse against lightermen (which meant no recourse except for negligence), than it was where the insurance was on the old terms, which was with recourse against lightermen. The plaintiffs' business was so extensive that it was worth while for a lighterman to give them his services exclusively, and in 1879 there was an arrangement come to between the plaintiffs and a Mr. Hooper to do all their lighterage on the terms that he was not to be liable for losses unless they arose from his own negligence, and he had ever since done the plaintiffs' lighterage, and on those terms. In May, 1882, and shortly before the policies the subject of this action were effected, a craft loss had occurred of sugar of the plaintiffs brought by the ship *Bittern*, which had been insured by the defendant and other underwriters on a similar policy to those now sued on. Messrs. Champion & Co., the plaintiffs' brokers, through whom the policy had been effected, wrote to the plaintiffs on the

20th of May, 1882, a letter containing the following:—"We have sent the papers relating to craft loss to Messrs. Powell & Jupp, average adjusters, to make up a statement. Of course you have seen the notices in the *Times* about lightermen's liability, including a letter to-day. Merchants are now insuring the craft risks excluded by lightermen, which seem to comprise all but negligence, at risks varying from 1*s.* to 2*s.* 6*d.* p. c. depending on the distance allowed in the Thames. The rate seems high, but it is not out of proportion to the risks as explained by lightermen. Have you any instructions to give?" The plaintiffs, however, effected through these brokers the insurances the subject of the present action, without paying any additional premium for the craft risk, or communicating to the underwriters the nature of the arrangement with Hooper, since the plaintiffs considered that Hooper was not acting for them as a general lighterman, but doing the plaintiffs' lighterage as their private lighterman, and as if the plaintiffs were doing their own lighterage, and the insurances now sued on were effected in like manner as previous insurances of the plaintiffs' goods. It was contended for the plaintiffs at the trial that the defendant had had in fact notice of this arrangement with Hooper, because in the action which was brought by his solicitors on behalf of the underwriters against Hooper for the craft loss ex the ship *Bittern*, his solicitor had direct notice of this arrangement, which formed in fact Hooper's defence to that action. The defendant himself, however, deposed that he had had no knowledge of its existence until some time after the insurances had been effected. The learned judge left certain questions to the jury, to which they returned specific answers.

The following are such questions and answers:—

1. Was the fact communicated to the underwriters that by the existing arrangement between Hooper and the plaintiffs, Hooper was liable only in case of negligence?—Answer. It was not commuuicated direct to the underwriters, but it was disclosed to the defendant's solicitors on the 5th of August.

2. Was the fact of the plaintiffs having that arrangement with Hooper material to the risk, that is to say, was it a fact which a prudent and experienced underwriter would have taken into consideration in estimating the premium?—Answer. Yes.

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3. If it was material, was it concealed?—Answer. No.

4. When the insurances were effected on the 21st and 25th of July and on the 5th and 23rd of September, was it the usual usage for merchants to employ lightermen on the terms of the resolution of the association of lightermen in April, 1882?—Answer. Yes.

5. Was that usage generally known?—Answer. Yes.

6. Were the underwriters reasonably justified under the circumstances of the case in assuming without inquiry that there would be recourse against lightermen with the liability of a common carrier?—Answer. No, they were not.

Upon these findings the learned judge ordered judgment to be entered for the plaintiffs for an agreed amount.

The Divisional Court afterwards set aside this judgment, and ordered it to be entered for the defendant. The plaintiffs appealed.

Webster, Q.C., and *R. Reid, Q.C.* (*Hollams* with them), for the plaintiffs. Assuming the findings of the jury to be correct, the judgment was rightly entered for the plaintiffs by Manisty, J., as the arrangement made with Hooper was not a matter which the plaintiffs as insurers were bound to disclose to the underwriters. The jury having found that there was a general usage to employ lightermen on terms similar to those under which Hooper was employed, that is, with the limited liability of being responsible only for loss by negligence, the underwriters were bound to have known such usage, and therefore there was no necessity to disclose what the defendant ought to have known: *Vallance* v. *Dewar*. (1)

[BRETT, M.R.:—If the second finding of the jury was wrong, the fourth and fifth findings become immaterial; but if the second finding was right, then the plaintiffs will have a difficulty in supporting the fourth and fifth findings, for to make it a matter which need not have been communicated the plaintiffs must shew that it was one which the underwriters ought to have known, and where usage is relied on for that purpose the usage must be general and of universal prevalence: 1 Arnould on Insurance, 5th ed., p. 568; *Tennant* v. *Henderson*. (2)]

(1) 1 Camp. 503. (2) 1 Dow 324.

There was evidence to support those fourth and fifth findings' and the defendant ought to have known that the practice was to employ lightermen who were not to be liable except for negligence. The employment of Hooper to do all their lighterage was as if the plaintiffs themselves did their own lighterage, when of course there would have been no recourse over.

Charles Russell, Q.C., and *Cohen, Q.C.* (*G. Barnes* with them), for the defendant. The second finding of the jury entitled the defendant to a verdict, because that shews the fact was a material one, and the answer to the first question shewed that it had not been communicated to the underwriters, the disclosure to the defendant's solicitor being for this purpose no disclosure to the defendant. The answer to the third question merely meant that there had been no fraudulent concealment, and that is immaterial, for if it was material the plaintiffs were bound to have communicated it to the defendant unless it was a matter which the defendant ought to have known. There was no evidence of such general usage, by which no lighterage was ever done except on the terms that the lighterman should be liable for negligence only. If so, there would not have been existing two different rates of premium, which made it important for the underwriter when insuring craft risk to know the terms on which the lighterage was to be done, and whether, therefore, in the event of a loss for which he would have to pay on the policy, he would or not have recourse over against the lighterman. It would necessarily affect the rate of premium for insurance.

[BRETT, M.R.:—But this would depend on the will of the assured after the policy had been effected. The plaintiffs, notwithstanding their arrangement with Hooper, might not have employed him to lighter these goods.]

It was an existing arrangement under which the plaintiffs at the time of effecting the policy intended to act, and therefore it was a material fact which ought to have been communicated to the underwriter, for it was a fact known to the assured and not known to the underwriter, and not a fact which the underwriter ought to have known: *Harrower* v. *Hutchinson.* (1) As laid down by Lord Blackburn, then Blackburn, J., in delivering the judg-

(1) Law Rep. 5 Q. B. 584.

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ment of the Court in *Ionides* v. *Pender* (1): "A concealment of a material fact, though made without any fraudulent intention, vitiates the policy," and as to what is material to be disclosed the Court (at p. 539) adopted "the rule laid down in Parsons on Insurance, vol. i., p. 495, that all should be disclosed which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters do in practice act." This has since been followed by *Rivaz* v. *Gerussi*. (2) No doubt "if the insurer knows the fact the omission on the part of the assured to communicate it will not avail as a defence in action for a loss," per Cockburn, C.J., in *Bates* v. *Hewitt* (3), but here there was evidence the other way.

Webster, Q.C., in reply.

BRETT, M.R. In this case the plaintiffs had effected policies with the defendant and other underwriters upon goods on board and in boats and lighters. [His Lordship then stated the risks insured and the facts of the case.]

Now, as to the first question left to the jury, they found that the existence of the arrangement between Hooper and the plaintiffs was not communicated to the underwriters, but was disclosed to the defendant's solicitors on the 5th of August. It seems to me that such a disclosure has no effect at all. A solicitor is not a standing agent for one who has been or may be his client, to receive a mercantile notice in respect of mercantile business. It may be doubtful whether there was a disclosure to the solicitor on the 5th of August, but whether there was or not seems to me immaterial. There is, therefore, the finding that this matter, which it has been contended on the part of the defendant ought to have been communicated, was not disclosed to the underwriters. Then comes a very material finding. [His Lordship here read the second question and the answer of the jury, and he also read the fourth and fifth questions and the answers to the same.]

Now the real substantial argument before us has been whether the jury were justified in answering the second question in the affirmative, and if they were, then whether they were justified in

(1) Law Rep. 9 Q. B. 531, at p. 537. (2) 6 Q. B. D. 222.
(3) Law Rep. 2 Q. B. 595, at p. 605.

answering the fourth and fifth questions as they did in the affirmative; and further, would such answers to those fourth and fifth questions materially affect the plaintiff's right. The matter has been ably and thoroughly argued out, and I have come to the conclusion that the jury were justified in answering the second question in the way they did, and that the direction of the learned judge contained in the latter part of that second question, namely, that if it was a fact which a prudent and experienced underwriter would have taken into consideration in estimating the premium, it was a material fact which ought to have been disclosed, was a right direction. The fact which it is said ought to be disclosed was the plaintiffs' arrangement with Hooper, which minimised Hooper's liability in case of loss. The only effect of such an arrangement on the underwriters would be, that assuming a loss for which the underwriters would be liable on the policy to pay the plaintiffs the sum assured, they would not have the same valuable recourse over against the lighterman as they otherwise would have had but for such an arrangement. It is obvious, therefore, that it would only affect the salvage which the underwriters might have, and if the underwriters had not taken any steps in the matter which had become known to the plaintiffs, I should have thought that the existence of that which would only minimise the underwriter's right to salvage was not a material fact. It would certainly have been immaterial to the risk, and, to my mind, immaterial to the insurance. But here there was evidence that it having become more or less publicly known that some lightermen would not carry goods unless their liability was minimised, there were obviously two states of things affecting underwriters' right to salvage where there was a loss on board lighters, — one where the lighterman was liable to the full extent of the law, and the other where there was not that full liability. To my mind, it does not signify what kind of lighters they were if that full liability did not attach. If they were owner's lighters, of course there would be no such liability to the underwriters by way of salvage. If they were wharfinger's lighters, it is a disputed question whether there would be such full liability or not. In my opinion there would; but it does not signify into which division it would go. The under-

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writers, finding that in one state of things they would have the advantage of using the assured's name against persons who were liable to the full liability, whilst in another state of things they would not have that advantage, came to the conclusion, as it seems to me, that they ran a greater risk of money loss in the one case than they did in the other, and that in the case in which the lighterman carried the goods without his full liability attaching, they would charge a larger premium than they would in the case where there was such full liability. Therefore, they resolved to have two rates of premium. If they had kept this resolution in their own breasts, it would have had no effect upon the matter which is here in question, as it would only have affected salvage, and would not therefore have been material, but they made it known, and there is evidence that it was known to the plaintiffs either personally or through their brokers before they effected these policies, that in one state of things one premium would have to be paid, and in another state of things it would be a different premium. It seems to me that under these circumstances it was material that the underwriters should know what was the plaintiffs' intention with regard to the lighterage of the goods, and if their contract with Hooper bound them to employ him it certainly was material that the underwriters should know it; but even if the contract of the plaintiffs did not so bind them, yet, as there were to their knowledge different rates of premium, and they had, at the time of insuring an intention to land the goods under an arrangement which, if disclosed, would influence the underwriters in requiring the larger rate of premium, it seems to me that it became, under those circumstances, a matter which a prudent and experienced underwriter would take into consideration in estimating the premium, and that therefore, according to the definitions which have been laid down, it was a material fact to be made known to the underwriters, and the jury were justified in answering the second question in the way they did. The authorities shew that the materiality is not as to the risk, but as to whether it would influence the underwriters in entering upon the insurance or the terms on which they would insure. The case which is most like the present is that of *Harrower* v. *Hutchinson* (1). There the assured insured

(1) Law Rep. 5 Q. B. 584.

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against a loss of goods on a voyage at and from any one port in a certain province. Now there was a port in such province called Laguna de los Padres, and it therefore was a port within the policy, but it was one which had not been so frequented by merchants as to throw upon underwriters the knowledge of the condition of that port, or even that there was such a port. An underwriter is bound to have such knowledge of the geography of ports from or to which he is insuring, which all other underwriters of ordinary skill would have; but if there is a port, or any circumstances with regard to it, which is not so well known as that all careful underwriters must be taken to know it, then it comes under the class of matters which an assured must disclose. What is it that an assured has to disclose? He has to disclose any circumstance which would affect the determination of a prudent and experienced underwriter in insuring, which is known to him, and which is not, or ought not to be, known to the underwriter. In that case the assured knew that there was such a port, and that it was more dangerous than the other ports, but the underwriter did not in fact know this, nor was he bound to know it, because the port had not been sufficiently frequented by merchants that it was to be assumed he knew it. The case, therefore, was within the definition of what must be disclosed, for it was not disputed, nor could it be, that the going to a port more or less dangerous must affect the determination of an underwriter in insuring, and the Court, therefore, held that the assured ought to have disclosed the fact that he was going to send the vessel to that port. Now apply that doctrine here. The assured here knew that they had made up their minds to land the goods by this particular lighterman Hooper, and they knew that they had a particular arrangement with him that, at all events, if Hooper did carry the goods he was only to be liable for negligence. The defendant in this case did not know of this arrangement with Hooper; therefore there was here a matter which the assured knew and which the underwriter did not know.

Then comes the question whether this was a matter which the underwriter ought to have known, and with that view the fourth and fifth questions were left to the jury. The given state of

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things which justified their answer to the second question was, that there was a diversity of practice, that is to say, that some goods were landed by lightermen with a full liability, whilst others were landed by lightermen with a limited liability. Then the fourth question is this, was it, when the insurances the subject of this action were effected, the usage for merchants to employ lightermen on the terms of the resolution of the association of lightermen? If that means was it a general practice, so general, that almost every merchant employed lightermen with the limited liability, it seems to me to destroy the very ground on which the answer to the second question was founded. Is it true, then, to say that there was only one way by which goods were landed in the Thames by lightermen, and that that was with a limited liability? It seems to me that by the evidence it is not true to say so, and that there was no evidence to support the finding of the jury upon the fourth question, and of course if that fails, the finding on the fifth question fails also. The case, therefore, remains upon the second finding of the jury, and the moment one comes to the conclusion that that second finding is right, it seems impossible that the fourth and fifth findings can be right, for they are inconsistent with it, as if they are right the second finding must be wrong. Now I think that the second finding is right, and that the fourth and fifth are wrong.

There then comes the sixth question. It is a mixture of law and fact, and puts the wrong proposition. To my mind the question is not whether underwriters had a right to assume one thing or another, but whether they had evidence before them on which to decide as to insuring. The sixth question is, to my mind, with the greatest deference, wrong in point of law and irrelevant. As regards the third question, if it means anything else than that the fact was not disclosed, I agree that there was no fraud, and that the answer was therefore right; but if it means that it was concealed in the sense that it was not disclosed, then the finding of the jury in answer to it was directly against the evidence, and cannot be supported. I have, therefore, come to the conclusion that the judgment of the Divisional Court was right, and ought to be supported.

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BAGGALLAY, L.J. I am of the same opinion. After the exhaustive manner in which the case has been disposed of by the Master of the Rolls, I will only shortly state the grounds on which I base my decision; they are, that there was evidence to support the finding of the jury in answer to the second question, and none to support their finding in answer to the third, fourth and fifth questions.

BOWEN, L.J. I am of the same opinion. It is established law that a person dealing with underwriters must disclose to them all the material facts which are known to himself and not to them, or, at all events, are facts which they are not bound to know. What are material facts, has been defined by authority. It is the duty of the assured to communicate all facts within his knowledge which would affect the mind of the underwriter at the time the policy is made, either as to taking the contract of insurance, or as to the premium on which he would take it. The materiality of the fact depends upon whether or no a prudent underwriter would take the fact into consideration in estimating the premium, or in underwriting the policy. The rule has been clearly laid down over and over again, and is to be found in *Ionides* v. *Pender* (1) and other cases.

Now, that being the law, what are the circumstances. Down to the year 1882 there seems to have been no great importance attached by underwriters to the way, in which importers of goods dealt with their lightermen in the use of lighters in the Thames for the landing of their goods; but in 1882 the lightermen combined together to free themselves from the liability of common carriers, and came to a resolution that they would not undertake that responsibility, but would only be liable for negligence, and this was made known to the merchants and underwriters, and the underwriters thought that such determination on the part of the lightermen was of sufficient importance to affect the underwriting of policies and the premiums they required. Now, as long as it remained uncertain how the cargo brought by a ship to the Thames would be dealt with, whether it would be landed by lightermen subject to their common law liability as carriers, or

(1) Law Rep. 9 Q. B. 531.

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whether by lightermen who landed the goods upon the terms that they were to be exempt from such liability, there would be nothing which the assured knew which the underwriters did not know, and, therefore, nothing which the assured was bound to disclose; but the moment the merchant has made an arrangement which determines that uncertainty, either by an agreement by which he binds himself to employ a lighterman to carry the goods without being subject to the common law liability, or even supposing that he does not bind himself to employ a lighterman, yet, if by what is done he makes an arrangement which practically governs the future, and which he intends to carry out at the time he so effects the policy, then, as it seems to me, there exists something which is in the knowledge of the assured, and which is not in the knowledge of the underwriter.

Then is it material that it should be disclosed? The evidence was that after May, 1882, premiums of insurance were affected by the existence or non-existence of such an arrangement, and after the letter of the plaintiffs' brokers to them of the 20th of May, 1882, it is impossible to say that the existence of such an arrangement between the plaintiffs and Hooper was not (as found by the jury) material, that is to say, a fact which a prudent and experienced underwriter would have taken into consideration in estimating the premium. It is not necessary to discuss the question whether what would merely lessen the salvage is a matter which ought to be disclosed, nor to enter into the nature of the arrangement between the plaintiffs and Hooper. What I found my judgment upon is this, that at the time of effecting these policies there was an arrangement existing between the assured and Hooper, which was intended by the assured to be acted upon, and which, as found by the jury, was a material fact affecting underwriters in estimating the premium. If that be the true view of the case, the cardinal point has been decided and the remaining answers are only embarrassing. If the finding by way of answer to the fourth question means that practically there was only one way of landing goods, and that there was a general usage to employ lightermen on the terms of their being discharged of the common law liability of carriers, that would be inconsistent with the answer given by the jury to the second

question, and there is no evidence to support such a verdict. But I am inclined to read the answer to the fourth question as meaning that there was a usage (so common as to be generally known) that lightermen might be employed by merchants on the terms of their being subject to the common law liability, but that they might equally well be employed on the terms that they should not be subject to such general liability. If that be the right way of reading it, then it appears to me that the answer was immaterial. The merchant may employ a lighterman on any terms he pleases, but as soon as there is a fixed agreement or arrangement existing between him and the lighterman at the time of making the policy which might affect the premium, that is a material fact and ought to be disclosed to the underwriters. Therefore if the answer to the fourth and fifth questions is to be read as I think it is, it is no answer to the finding of the jury in answer to the second question, and if it be read as meaning that there was only one prevalent way of landing goods, then there was no evidence to support it. The same observation applies to the answer to the sixth question, and I agree with the Master of the Rolls that it cannot displace the answer to the second question, upon which, in my opinion, the whole of this action depends.

Appeal dismissed.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitors for defendant: *Waltons, Bubb & Walton.*

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June 18.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* RAWLINS.
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*Poor-rate—Salary derived from Poor-rate—Disqualification of Guardian—*5 & 6 *Vict. c.* 57, *s.* 14—*Clerk of Highway Board—Clerk of School Board—Payment out of Funds raised in a Poor-rate—*27 & 28 *Vict. c.* 101, *s.* 32—33 & 34 *Vict. c.* 75.

The Act 5 & 6 Vict. c. 57, s. 14, which enacts that "no person receiving any fixed salary . . . from the poor-rates in any parish or union, shall be capable of serving as a guardian in such parish or union," does not apply to the clerk of a highway board or of a school board whose salary is paid out of the highway or school board fund, which is a fund supplied from moneys contributed by parishes in pursuance of precepts issued under the Highway Act, 1864, 27 & 28 Vict. c. 101, or the Elementary Education Act, 1870, 33 & 34 Vict. c. 75, respectively.

Judgment of the Queen's Bench Division (14 Q. B. D. 325) affirmed.

APPEAL in the first of these cases by the prosecutor from an order of the Queen's Bench Division discharging a rule calling on the defendant Rawlins to shew cause why an information in the nature of a quo warranto should not be exhibited against him to shew by what authority he claimed to exercise the office of a guardian of the poor of the parish of Wimborne Minster in the Wimborne and Cranborne Union, in the county of Dorset. The facts are set out in the report of the case in the Queen's Bench Division. (1) It is sufficient here to state that Rawlins, who had been elected guardian of the said union, was clerk to the Wimborne Highway District Board, which included several parishes in that union, at an annual salary of 50*l.*, and that the question was whether such salary was paid from the poor-rates in any parish in the union, so as to make Rawlins disqualified by 5 & 6 Vict. c. 57, s. 14, from serving as such guardian.

The salary of Rawlins as clerk to the highway district board was charged to a highway fund contributed by the several highway parishes within such district in proportion to the rateable value of the property in each parish, as directed by 27 & 28 Vict. c. 101, s. 32, but several of such parishes were not parishes separately

(1) 14 Q. B. D. 325.

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maintaining their own poor. The fund was supplied from moneys (some of which were poor-rates, and some not) levied under precepts directed by the highway board to waywardens and overseers under the authority of s. 33 of that Act, and afterwards paid over to the highway board.

The Queen's Bench Division held that the salary under these circumstances was not paid from the poor-rates within the meaning of 5 & 6 Vict. c. 57, s. 14, so as to disqualify Rawlins from serving as guardian.

The prosecutor appealed.

Bullen, for the appellant. (1) The salary of the defendant is paid out of the poor-rate, and therefore he is disqualified from being guardian by 5 & 6 Vict. c. 57, s. 14, being a "person receiving a fixed salary or emolument from the poor-rates" in the union of which he is guardian. Where the precept of the highway board is addressed to the overseers, they are, by s. 33 of the Highway Act of 1864 (27 & 28 Vict. c. 101), to "pay the sum thereby required out of a poor-rate to be levied by them or out of any moneys in their hands applicable to the relief of the poor," and even where the precept is addressed to a waywarden, the separate rate out of which it is to be paid is by that same 33rd section (except in the case of a parish where there has been the custom of the surveyor of highways to levy a highway rate which does not apply here,) to be levied as a poor-rate. By 41 & 42 Vict. c. 77, s. 7, all the expenses of any highway board are to "be deemed to have been incurred for the common use or benefit of the several parishes within their district, and shall be charged on the district fund."

[BRETT, M.R. How is the district fund formed?]

It is difficult to say unless it be raised by rates made by the overseers.

[BRETT, M.R. Sect. 34 of 27 & 28 Vict. c. 101, which gives power to the waywardens and overseers to levy the rate required for making a payment to a highway board, seems to distinguish

(1) Sect. 15 of Supreme Court of Judicature Act, 1884 (47 & 48 Vict. c. 61), which enacts that "proceedings in quo warranto shall be deemed to be civil proceedings whether for purposes of appeal or otherwise," was cited to shew that this appeal would lie.

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such rate from a poor-rate, for it enacts that they shall have the same powers, in the case of overseers as they have of levying an ordinary poor-rate, and in the case of waywardens as they would have were they overseers, and the rate were a duly authorized poor-rate.]

Still the 33rd section shews that the payment is to be made either out of a poor-rate to be levied, or out of any moneys in their hands applicable to the relief of the poor.

Bosanquet, Q.C., and *Claude C. M. Plumptre*, for the defendant. The union of which the defendant has been elected guardian overlaps the highway district. The district fund is formed out of moneys contributed by the several highway parishes according to the precepts ordered by the highway board pursuant to s. 33 of 27 & 28 Vict. c. 101, and which may therefore be contributed by parishes which are not parishes separately maintaining their own poor, but are only highway parishes, as well as by ordinary parishes, so that the fund may be composed of money from the poor-rates, and of money from rates which are not poor-rates. The defendant consequently, who receives his salary from this fund, does not receive it from the poor-rates of the parish or union of which he is guardian, and is therefore not disqualified by 5 & 6 Vict. c. 57, s. 14.

Bullen, replied.

BRETT, M.R. The question is whether Mr. Rawlins is a person "receiving a fixed salary or emolument from the poor-rates in any parish" of the union, of which he has been made guardian. If he is such a person, he is not capable of being a guardian of that union. Now that he is a person receiving a fixed salary I think cannot be denied, therefore the question comes to this: does he receive that salary from the poor-rates? He is an officer of a highway board, and his salary in that respect is determined by the 32nd section of 27 & 28 Vict. c. 101. That section, though not repealed, is modified by the 7th section of 41 & 42 Vict. c. 77, but even if his salary be paid under that 7th section it would make no difference as regards the point in this case, for it would be one of the expenses of the highway board, and it is charged on the district fund. But in my opinion his salary is

payable under 27 & 28 Vict. c. 101, s. 32. Then out of what fund according to that section is his salary payable? That section states that "the salaries of the officers appointed for each district"—Mr. Rawlins is such an officer—"shall be annually charged to a district fund;" that means it shall be paid out of a district fund. Now the district fund is by that 32nd section to be contributed by and charged upon the several highway parishes within the district. It is not charged upon an ordinary parish, although an ordinary parish may in some circumstances be conterminous with and practically the same thing as a highway parish, but it is to be contributed by the several highway parishes. Now is there more than one kind of highway parish? The 33rd section of that Act enacts that "for the purpose of obtaining payment from the several highway parishes within their district of the sums to be contributed by them, the highway board shall order precepts to be issued to the waywardens or overseers." Then it goes on to say "where a highway parish is not a parish separately maintaining its own poor" "the precept of the highway board shall be addressed to the waywarden of the parish," and "where the precept is addressed to a waywarden he shall pay the sum thereby required out of a separate rate, and such separate rate"—except in the case of a parish, to which it is not necessary to refer, where there has been the custom of the surveyor of highways to levy a highway rate—"shall be assessed on and levied from the persons and in respect of the property on, from, and in respect of which a poor-rate would be assessable and leviable, if the parish of which he is waywarden were a place separately maintaining its own poor." Therefore where the precept is to go to a waywarden, there is to be a separate rate. In some cases it is to be levied in the same way as if it were a poor-rate, but in others not, and not from the same people. Then the section says that "a waywarden, shall account to the highway board for the amount of all rates levied by him, and at the expiration of his term of office shall pay any surplus in his hands arising from any rate so levied above the amount for which the rate was made, to the treasurer of the highway board to the credit of the parish within which such rate was made, and such surplus shall go in reduction of the next highway

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rate that may be leviable in such parish." So that one thing which is to contribute to the district fund is something which is not a poor-rate at all. Then the section says that "where the precept is addressed to the overseers, they shall pay the sum thereby required out of a poor-rate to be levied by them, or out of any monies in their hands applicable to the relief of the poor." Therefore in those cases the contribution to the district fund is from the poor-rate. It follows from this that the district fund is made up of contributions from funds of different kinds. But the moment it is in the hands of the highway board, it is a fund of itself, and different from any of the funds which have contributed to make it, and it is not any one of them, therefore it is not a poor-rate. Then this officer is paid out of that fund which is not a poor-rate, and if that be true he is not, within the 5 & 6 Vict. c. 57, s. 14, a person receiving any fixed salary from the poor-rate, and consequently he is not incapacitated from being elected guardian of the union for which he was elected guardian. For these reasons I am of opinion that the Divisional Court was right and that their decision ought to be affirmed.

BAGGALLAY, L.J. I am of the same opinion. The real question is whether the salary of Mr. Rawlins, which he was undoubtedly entitled to as clerk of the highway district board, was payable out of the poor-rates of the parish or union which he served as guardian? At different times there have been various Acts of Parliament modifying the way in which the expenses of highway district boards shall be borne. I think it is sufficient to refer to the 32nd section of the 27 & 28 Vict. c. 101, because the 41 & 42 Vict. c. 77, though it modifies the directions as to the property on which the assessment is to be made, does not appear to me to affect the question which we have now to consider. The 32nd section of the 27 & 28 Vict. c. 101, provides that "the salaries of the officers appointed for each district, and any other expenses incurred by any highway board for the common use or benefit of the several parishes within such district shall be annually charged to a district fund to be contributed by and charged upon the several highway parishes

within such district" in the proportions mentioned, which were subsequently modified. Then the 33rd section, which appears to be the important one on the present occasion, directs how payment is to be obtained from the several highway parishes of the sums which are to be contributed by them. The highway board is to order precepts to be issued to the waywarden or overseers of the said parishes in accordance with the provisions therein contained, and the officer to whom the precept is addressed is within a limited time to pay the sum therein mentioned to the treasurer of the board. In the case we have to decide, the district fund was to be raised by the overseers, therefore it is immaterial to go into the provisions for the issuing of the precept to a waywarden beyond noting that the district fund may be composed of funds raised by the overseers, and also of funds raised by the waywardens, which last can in no respect be regarded as in the nature of poor-rates. Where the precept is addressed to the overseers, they are to pay over to the highway board the sum required out of a poor-rate to be levied by them or out of any moneys in their hands applicable to the relief of the poor. It appears to me the view taken by the Divisional Court was quite right, for the fund out of which Mr. Rawlins' salary was to be paid was not the proceeds of a general poor-rate in the hands of the overseers, but was a fund separated from the poor-rate and subject to the disposition of a different and separate authority. It therefore does not come within the language of the prohibitory clause of 5 & 6 Vict. c. 57, nor does it come within that which we suppose to have been the principle on which the enactment was passed, namely, that a man should not have the opportunity of voting the payment of money to himself.

BOWEN, L.J. I am of the same opinion. The question is whether Mr. Rawlins is a person, within the language of 5 & 6 Vict. c. 57, s. 14, who receives a fixed salary from the poor-rates of the parish or union of which he is a guardian. Mr. Rawlins receives his salary from a fund which is fed partly by contributions in the nature of poor-rates, and partly by contributions which are not in the nature of poor-rates. He cannot, therefore, be said to receive his fixed salary from the poor-rates. I think,

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therefore, he is not within the section, and the appeal must be dismissed.

Appeal dismissed.

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The appeal in this case, which related to the clerk to the school board, whose salary was paid out of a rate raised under the Elementary Education Act, 1870, was dismissed without argument, being governed by the decision in *Reg.* v. *Rawlins.*

Appeal dismissed.

Solicitors for prosecutor: *Roberts & Barlow.*
Solicitors for defendants: *Lovell, Son, & Pitfield.*

W. P.

June 29.

[IN THE COURT OF APPEAL.]

PERRY AND ANOTHER *v.* BARNETT.

*Principal and Agent—Stock Exchange, Usage of—Bank Shares, Contract for Sale of—Omission to specify Numbers of Shares—*30 *&* 31 *Vict. c.* 29, *s.* 1—*Broker's Right to Indemnity.*

The defendant instructed the plaintiffs, stockbrokers of Bristol, to purchase for him shares in a joint stock banking company on the London Stock Exchange. The plaintiffs gave directions accordingly to their London agents, brokers on the London Stock Exchange, who purchased the shares from jobbers on the Stock Exchange in the usual way, without having in the contract distinguishing numbers of the shares, it not being the practice on the London Stock Exchange to specify the numbers or otherwise to comply with 30 & 31 Vict. c. 29 (Leeman's Act), s. 1. By the rules of such Stock Exchange it is provided that the Stock Exchange shall not recognise in its dealings any other persons than its own members, such members, if they do not carry out contracts, being liable to be expelled from the Stock Exchange, and that no application to annul a contract shall be entertained by the committee of the Stock Exchange unless upon a specific allegation of fraud, or wilful misrepresentation. Before the settling day the defendant repudiated the contract, but the committee of the Stock Exchange refused to annul the contract, and therefore the plaintiffs completed it, and paid the price of the shares. The defendant was ignorant of the usage of the London Stock Exchange with regard to dealings in shares of banking companies, and did not know that the purchasing broker was by such usage bound to perform a contract for the purchase of banking shares, though void at law under Leeman's Act:—

Held, affirming the decision of Grove, J., that the plaintiffs were not entitled

to recover from the defendant the money paid by them as the price of the shares, since the usage of the Stock Exchange to disregard Leeman's Act, and to recognise as valid a contract which was made contrary to that Act, was unreasonable as against strangers who did not know it, and therefore was not binding on the defendant.

APPEAL by the plaintiffs against a judgment of Grove, J., in an action tried without a jury.

The facts are fully stated in the report of the proceedings before that learned judge. (1) They are shortly as follows:—

The plaintiffs, stockbrokers at Bristol, were instructed by the defendant on the 1st of May, 1884, to purchase for him 100 Oriental Bank shares, on the London Stock Exchange, as they were not to be obtained on the Bristol Stock Exchange. The plaintiffs accordingly wrote to their London agent, Carr Brothers & Smith, brokers on the London Stock Exchange, to buy such shares, and Carr Brothers & Smith thereupon purchased them from jobbers on the London Stock Exchange. The contract notes were according to the usual form and did not specify or refer to the numbers of the shares as required by Leeman's Act (30 & 31 Vict. c. 29), s. 1, it not being the practice on the London Stock Exchange to make contracts for the purchase and sale of bank shares in the form required by Leeman's Act, as, having regard to the exigencies of business, it was found to be impossible to comply with the requirements of that Act. The Oriental Bank closed its doors on the afternoon of the 2nd of May, and the defendant therefore repudiated the contract for the purchase of the shares.

By the 52nd rule of the Stock Exchange it is provided that "the Stock Exchange does not recognise in its dealings any other parties than its own members, and every bargain, therefore, whether for account of the members effecting it or for account of a principal, must be fulfilled according to the rules, regulations, and usages of the Stock Exchange" and by the 58th rule it is provided that "no application which has for its object to annul any bargain in the Stock Exchange shall be entertained by the committee unless upon a specific allegation of fraud or wilful misrepresentation." The committee of the Stock Exchange

(1) 14 Q. B. D. 467.

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decided to treat the contract for the purchase of these Oriental Bank shares as binding. The plaintiffs therefore carried out the contract and paid the purchase-money for the shares, since a member of the Stock Exchange who does not carry out his contract is liable by the rules to be declared a defaulter, and to be expelled from the Stock Exchange.

The present action was brought to recover the money which the plaintiffs had so paid, and was tried before Grove, J., without a jury. The learned judge found as a fact that the defendant did not know the usage of the London Stock Exchange to disregard Leeman's Act, and to treat a contract for the purchase of bank shares as valid and binding, although it was made void by that Act for not complying with its requirements, and on account of ignorance of such usage the learned judge gave judgment for the defendant, and distinguished the case from *Read* v. *Anderson* (1), and *Seymour* v. *Bridge*. (2)

The plaintiffs appealed.

Finlay, Q.C., and *Horne Payne*, for the plaintiffs. The learned judge was wrong in finding as a fact that the defendant was ignorant of the usage. He had as much knowledge of the usage as the defendant in *Seymour* v. *Bridge* (2), and he ought to have been taken to have known it, as Mathew, J., held with regard to the defendant in that case. Next, assuming the defendant not to have known the usage, he was liable to indemnify the plaintiffs, inasmuch as he had authorized the plaintiffs to purchase the bank shares for him according to the rules and usages of the London Stock Exchange, and the case is governed by *Read* v. *Anderson*. (1) It is also supported by the decisions in *Barclay* v. *Pearce* (3) and *Seymour* v. *Bridge*. (2) The defendant will rely on *Neilson* v. *James* (4), which was referred to by Grove, J., in his judgment, but there the broker was employed to sell and not

(1) 13 Q. B. D. 779.

(2) 14 Q. B. D. 460.

(3) Not reported: see note (2), 14 Q. B. D. 469. The question in that case arose upon an application for leave to sign judgment under Order XIV., r. 1 and the Court of Appeal held that the defendant in an action by a broker to recover money paid under somewhat similar circumstances to those of the present case must bring the money into Court as a condition of being allowed to defend.

(4) 9 Q. B. D. 546.

to buy bank shares, and he might easily have given in the contract note the name of the registered proprietor, and complied with the terms of Leeman's Act, and in consequence of his not doing so, and so not making a valid contract of sale, his employer remained the registered proprietor and suffered a loss. That is very different from the case where, as here, the broker is directed to purchase shares on the market of the Stock Exchange, where it is found impossible to comply with the Act. The authority given to the plaintiffs must be assumed to be to buy such shares according to the usage of such market.

Lumley Smith, Q.C., and *T. Willes Chitty*, for the defendant. The plaintiffs were employed to make a valid and binding contract and not a contract which was void. In the absence of knowledge of the usage (and it must be assumed here that there was such absence of knowledge according to the finding of the learned judge), the defendant can only be bound by a custom of the Stock Exchange which was reasonable and consistent with the agent's employment. Here the usage to disregard the statute and to carry out a contract which is void by the statute is unreasonable, and inconsistent with the employment of the plaintiffs as defendant's agents, and is therefore not binding on a person who was ignorant of it at the time of the employment: *Robinson* v. *Mollett* (1) and *Neilson* v. *James*. (2) The case of *Read* v. *Anderson* (3) is very distinguishable from the present, as there both parties knew that a betting contract was void.

Finlay, Q.C., replied.

BRETT, M.R. In this case the defendant, a merchant conversant with business on the London Stock Exchange, instructed the plaintiffs, stockbrokers in Bristol, to buy for him certain bank shares. He knew that they could not be purchased in Bristol, and, as he instructed the plaintiffs to purchase them for him in London, it seems to be the same as if he had instructed a London stockbroker to purchase the shares on the London Stock Exchange. The plaintiffs thereupon, through their London agent, bought the bank shares upon the terms of the London Stock

(1) Law Rep. 7 H. L. 802. (2) 9 Q. B. D. 546.
(3) 13 Q. B. D. 779.

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Exchange. Now the shares being bank shares ought to have been bought according to Leeman's Act; but they were not, and the stipulations in that Act were not complied with, and the result was that the contract for the purchase was one which could not be enforced. But by the rules of the London Stock Exchange if the stockbrokers or jobbers did not carry out that contract, either of them who declined to do so would have been expelled from the Stock Exchange. Thereupon the London stockbroker paid the jobber, and the plaintiffs, the Bristol stockbrokers, who knew that practice of the London Stock Exchange and that they would be bound by that rule of the Stock Exchange, paid the London stockbroker. Then the plaintiffs bring this action against the defendant, and allege that inasmuch as by reason of the rule of the London Stock Exchange which was within the defendant's knowledge, the plaintiffs had been obliged to pay the London stockbroker, so in like manner the defendant, who had instructed the plaintiffs to deal for him upon the London Stock Exchange, was bound to pay them. The plaintiffs tried at the trial to prove that the defendant knew such rule and practice of the London Stock Exchange, but Grove, J., who tried the action and who heard the evidence, came to the conclusion as a matter of fact that the defendant did not know them, and, therefore, according to our rules, we accept the decision of the learned judge upon that point. It was, however, contended that although in fact that was so, yet, as the defendant employed the plaintiffs to deal for him on the London Stock Exchange, he must be assumed to know such rules and customs, that is to say, he must be treated as if he did. Now the proposition that a person who directs another to deal upon a particular market is to be treated as if he knew the rules of that market, has been adopted in the law to some extent, but certainly not to this extent, that however unreasonable or illegal they may be, he is still to be treated as if he knew them. There is a line of demarcation between rules by which such person is bound and rules by which he is not bound, and the rules of the Stock Exchange applicable upon this occasion would seem to come within the latter of these. There is no definite rule of the Stock Exchange on the subject, but there is said to be a practice so universal as to

amount to a custom on the London Stock Exchange that, when a man makes a contract respecting bank shares, the dealers there advisedly neglect to follow the stipulations of Leeman's Act. That Act was directed against speculations in bank shares, and therefore was against contracts for bank shares between persons who had not any such shares in their possession. This, if carried out, would have diminished the business of persons on the Stock Exchange, and therefore they disregarded the Act as being impracticable. The Act was impracticable no doubt where persons desired only to speculate, but not where they really desired to buy or sell shares. Then the dealers on the London Stock Exchange have made another rule, and that is, that to enable them to do what this Act of Parliament, called Leeman's Act, prohibits them from doing, they will not interfere with the carrying out of any contract made upon the Stock Exchange unless there be some fraud in the matter; therefore, however unusual or oppressive such contract may be, it must be carried out unless there be some fraud, or otherwise the member who refuses to carry it out will be expelled from the Stock Exchange. Now the Courts have always taken upon themselves to consider whether a custom is or not within the bounds of reason, and if the custom is unreasonable the Courts have said they will not recognise it as binding on people who do not know it and who have not consented to act upon it. It seems to me that the rule of the London Stock Exchange by which every contract made there, whatever its terms, must be fulfilled by its members unless there has been fraud, is as a custom unreasonable and one which cannot be supported. Then look at it as regards such a person as the defendant. The defendant instructs his brokers, the plaintiffs, to purchase bank shares for him, but, in truth, according to its legal effect, the instructions which he gives are to make a contract with some other person for the purchase of bank shares from such other person. When one instructs an agent to make a contract, it obviously means that he is to make a binding contract, but according to this rule of the London Stock Exchange, the agent is allowed to make a contract which is not binding, and which is, therefore, wholly inconsistent with the instructions given him. Then it is said by a rule of the London Stock Exchange, which the defendant

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does not know, the plaintiffs are to be allowed to pay for that which is inconsistent with the instructions the defendant gave, and to say that the defendant is bound to pay them because, by the rule of the London Stock Exchange, the plaintiffs were bound to pay some one else. It seems to me that such rule is as a custom wholly unreasonable. Therefore, adopting the rule I laid down in *Robinson* v. *Mollett* (1), and which seems to me to comprise the rule in *Neilson* v. *James* (2), I am of opinion that even though it be proved as a matter of fact that there exists such a rule on the London Stock Exchange as that to which I have alluded, it would be wrong to say that the defendant, who was ignorant of it, ought to be treated as if he knew it, merely because he instructed the plaintiffs to deal upon the London Stock Exchange. For these reasons I think that the judgment of Grove, J., was right and must be affirmed.

BAGGALLAY, L.J. I am of the same opinion. Leeman's Act was passed in 1867, and, as appears from the preamble, it was "for the prevention of contracts for the sale and purchase of shares in joint stock banking companies of which the sellers are not possessed, or over which they have no control," yet for eighteen years the Stock Exchange has ignored the Act. Now, in the present case, notwithstanding that the requirements of the statute had not been complied with in the contract in question for the purchase of the Oriental Bank shares, and such contract was, therefore, not binding, the committee of the Stock Exchange decided to treat it as binding. The committee relied on the 52nd and 58th rules of the Stock Exchange. [His Lordship here read those two rules as set out, ante, p. 389.] Therefore, there being no suggestion here of fraud or wilful misrepresentation, the contract for these shares was recognised as binding on the parties by the Stock Exchange. That being the practice upon the London Stock Exchange the defendant authorized the plaintiffs, brokers at Bristol, to purchase for him on the London Stock Exchange 100 shares in the Oriental Bank. They were accordingly so purchased, and upon the following day the bank stopped. Thereupon the defendant repudiated the contract, on the ground that by not complying

(1) Law Rep. 7 H. L. 818. (2) 9 Q. B. D. 546.

with the terms of Leeman's Act it was not a valid contract. The present action was brought against the defendant on the footing, that as he authorized the purchase of these shares upon the London Stock Exchange he was bound by those rules. I cannot think he was. In my opinion, all that he authorized the plaintiffs to do was, to get a valid contract made for the purchase of the shares, and he did not authorize the making of any contract other than a binding one. If it could have been proved that the defendant was aware at the time he instructed the plaintiffs that the London Stock Exchange did not recognise Leeman's Act, but held contracts to be binding although they did not comply with the requirements of that Act, then the case would have been different. Here, however, the learned judge who tried the action has found as a fact that the defendant had no personal knowledge of the rule and practice in this respect of the London Stock Exchange.

Then it was next urged that if the defendant gave the plaintiffs authority to purchase on the London Stock Exchange, he was bound by the rules of the Stock Exchange as to such purchase. But, in my opinion, the defendant was only bound by such rules as were reasonable and proper rules. That point was distinctly recognised in *Neilson* v. *James* (1), where an authority had been given to sell bank shares, and they were sold by the broker by a contract according to the ordinary practice of the Stock Exchange without any distinguishing numbers of the shares or the name of the registered proprietor, and it was there contended, as in the present case, that a person who authorizes a dealing upon the Stock Exchange must be presumed to know its customs, but it was held that such presumption only applied to those customs as were reasonable. "I think, however," said the present Master of the Rolls, in his judgment in that case, "that the plaintiff is only bound by such a custom as is both reasonable and legal, for to that extent only can a person who is ignorant of a custom be assumed to acquiesce in and be bound by it. Now the contract for sale which the defendant made did not comply with the terms of the Act 30 & 31 Vict. c. 29, and was, therefore, illegal and void" (illegal being used in the sense of being contrary to the

(1) 9 Q. B. D. 546.

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provisions of the Act), "but it is alleged that by the custom of the Bristol Stock Exchange, although the defendant undertook to make a contract for sale, yet he did not undertake to make a contract which should bind the purchaser. Such a custom, I think, is both unreasonable and illegal." We are, I think, bound by the view so taken in that case, although I should be of the same opinion independently of any authority. I think this case should be decided on the ground that the defendant only authorized the plaintiffs to make a valid contract for the purchase of the Oriental Bank shares, and that the defendant is not liable, as the plaintiffs did not make a valid contract for such purchase.

BOWEN, L.J. The question in this case belongs to the law of contract, and in order to determine it I think we must make up our minds what is the contract which existed here between the principal and agent, and this is a question which depends upon the inference we draw from the facts in this case. In drawing such inference one important thing to be considered is, what was the knowledge of the parties as to the rules and usages of the market on which the shares were to be bought. In this case the learned judge who tried the action has decided that the defendant did not know the rules and customs of the London Stock Exchange. The defendant must, I think, have known some of them, and if the learned judge had found that he knew the very usage as to dealings in bank shares I should not have been dissatisfied with the finding, but the judge who sees the witness must be a better judge than the Court of Appeal of the veracity of the witness; and upon the question of fact, therefore, I acquiesce in the finding of the learned judge, and assume that the defendant did not know of this usage. Then, under those circumstances, what inference should one draw as to the nature of the broker's employment. He was employed to buy shares in a bank, and the effect of Leeman's Act is to make void any contract for such shares which is not made in the form prescribed by that Act. It appears, however, that dealers on the London Stock Exchange are in the habit of making contracts as to bank shares which are invalid by reason of their not complying with the terms of Leeman's Act, and of treating them as valid contracts. It has been denied that it is

practicable to make valid contracts on the Stock Exchange for bank shares in compliance with Leeman's Act. I do not believe this. No doubt speculative contracts cannot be made, and because the great object of the Stock Exchange is to deal in speculative contracts, Leeman's Act is not complied with, and contracts are made which are void by that Act, and there is a custom of the Stock Exchange that when such contracts are made the brokers are to be bound as if the contracts were valid. Now a person may employ a broker upon the Stock Exchange to buy or sell bank shares in conformity with Leeman's Act, that is to say, he may employ him to make a valid contract as to such shares. He may, however, as no doubt many do, employ him to make a contract for bank shares which both parties know is not intended to comply with Leeman's Act, and, therefore, is not enforceable at law. A person may employ a broker to make either kind of contract. Which did the defendant do in the present case? That is a question of fact depending on the inference to be drawn from the circumstances of the case. It does not appear that the defendant knew of Leeman's Act, but a man cannot excuse himself on the ground of ignorance of an Act of Parliament, and the broker had a right to assume that the defendant knew the statute as well as the broker knew it himself; but the learned judge at the trial has found that the defendant did not know that there was a custom on the Stock Exchange of making contracts contrary to Leeman's Act and of treating them as if they were valid. Then the question is narrowed to this, is a man who employs a broker to deal on a particular market bound to know a usage there to make an invalid instead of a valid contract, and a usage according to which when he has ordered one thing he is expected to take another thing? It would not be reasonable, I think, to hold that a person is bound by such a usage, unless beforehand he was told or had knowledge of it. Such a usage, when applied not to brokers but to strangers who are ignorant of it, is inconsistent with the contract of employment. To bind outsiders by it would be unreasonable; and it is as regards such outsiders, and such outsiders only, that such a usage can be called unreasonable, for it would not be unreasonable as regards those who know of it and desire to be bound by it; nor in my view can the usage be called

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illegal in any other sense than what I have stated. On this point I think we are bound by the decision in *Neilson* v. *James* (1), with which, however, I fully agree. So, also, the language of the present Master of the Rolls and of Lord Chelmsford in *Robinson* v. *Mollett* (2) is identical as to this, viz., if a person employs a broker to buy or sell on a market of the usage of which such person is ignorant, he authorizes him to make contracts upon the footing of such usages as are reasonable and as do not alter the character of such contracts. To go further would be inconsistent with the hypothesis that the agent is employed to make a valid contract. I decide, therefore, this case in conformity with *Robinson* v. *Mollett* (3) and *Neilson* v. *James*. (1) We are not, I think, necessarily overruling the judgment of Mathew, J., in *Seymour* v. *Bridge*. (4) Grove, J., distinguished the present from that case, on the ground that in *Seymour* v. *Bridge* (4) Mathew, J., imputed to that defendant knowledge of the usage, which Grove, J., declined to follow as a finding of fact in the present case; and I think that that makes all the difference between the two cases.

Appeal dismissed.

Solicitors for plaintiffs: *Ley & Lake, for Danger & Cartwright.*

Solicitors for defendant: *Meredith, Roberts, & Mills, for Osborne Ward, Vassall, & Co.*

(1) 9 Q. B. D. 546.
(2) Law Rep. 7 H. L. at pp. 818, 836.
(3) Law Rep. 7 H. L. 802.
(4) 14 Q. B. D. 460.

W. P.

[IN THE COURT OF APPEAL.]

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June 19.

EX PARTE ORAM. IN RE WATSON.

Bankruptcy — Bankruptcy Petition — Dismissal — Adjournment—"Sufficient cause"—Prior Arrangement between Debtor and Creditors—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), s. 7 (3).

The fact that a debtor has, shortly before the presentation of a bankruptcy petition against him, entered into an arrangement with his creditors (to which the petitioner has not assented) is not, however beneficial to the creditors the terms of the arrangement may be, a "sufficient cause" within the meaning of s. 7 (3) of the Bankruptcy Act, 1883, for dismissing the petition.

And, there being no jurisdiction under such circumstances to dismiss the petition, there is no jurisdiction to adjourn the hearing of it with a view to its ultimate dismissal in case the arrangement shall be found to work well.

The decision in *Ex parte Dixon* (13 Q. B. D. 118) did not depend upon the particular terms of the arrangement in that case, but on the fact that the arrangement was made at such a time and in such a manner as not to bind dissentient creditors.

APPEAL from an order of Mr. Registrar Pepys, adjourning the further hearing of a bankruptcy petition, presented by George Oram against Messrs. Watson, Smith, & Watson.

The debtors carried on the business of contractors. On the 31st of March, 1885, they executed a deed of arrangement with their creditors. The deed was prepared in pursuance of a resolution passed at a meeting of the creditors held on the 9th of March. It was executed by a considerable number of the creditors. The principal object of the deed was to preserve from forfeiture a valuable railway contract which the debtors were carrying out, and which was liable to forfeiture in the event of their bankruptcy. On the 24th of April, 1885, the petitioner, who had recovered judgment against the debtors for £103 8*s.* 1*d.*, filed a bankruptcy petition against them, founded upon an act of bankruptcy committed by them in not complying with a bankruptcy notice which he had served on them. The petitioner had not executed or assented to the deed. On the hearing of the petition the registrar was asked on behalf of the debtors to adjourn the hearing, on the ground that the arrangement made by the deed would be much more beneficial to the creditors generally than a

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bankruptcy. The registrar refused to make a receiving order, and ordered that the further hearing of the petition should be adjourned generally, with liberty to apply. The registrar thought that it was desirable to see how the arrangement made by the deed would work.

The petitioner appealed.

Herbert Reed, for the appellant. The fact that the debtors have entered into a private arrangement with a number of their creditors is no answer to a bankruptcy petition by a creditor, who has not assented to the arrangement; it is not a "sufficient cause" within sub-s. 3 of s. 7 (1) of the Bankruptcy Act, 1883: *Ex parte Dixon.* (2) The debtors ought to be examined: the deed ought not in this way to be made binding on a dissenting minority of the creditors. A scheme of arrangement ought not to be imposed on them without any investigation of the affairs of the debtors.

[He was stopped by the Court.]

Upjohn, for the debtors.

[BRETT, M.R. It seems to me that the principle of the decition in *Ex parte Dixon* (2) is inconsistent with an adjournment sine die for the reason given by the registrar. Was he not, in ordering the adjournment, taking a step towards the dismissal of the petition under s. 7 (3)?

BOWEN, L.J. If under no circumstances the deed could be an answer to the application for a receiving order, what was the use of adjourning the hearing?]

Ex parte Dixon (2) does not apply. The provisions of the deed in the present case are very different from those of the deed in *Ex parte Dixon.* (2) There is no release of the debtors; there is only a covenant not to sue them for a limited time. In *Ex parte Dixon* (2) the deed gave the creditors no more than they would get under a bankruptcy, and they were deprived of the safeguards which a bankruptcy would have given them; in the present case

(1) Sect. 7 (3): "If the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition."

(2) 13 Q. B. D. 118.

the scheme is not for a liquidation of the affairs of the debtors in the ordinary way, but for the payment of 20*s.* in the pound within a limited time. The object is to preserve from forfeiture a valuable contract from which the debtors expect to make a profit of 45,000*l.* This will be lost to the creditors if a receiving order is made. Is one dissentient creditor to be allowed to deprive all the others of this benefit? The Court has a discretion as to making a receiving order. The intention of the Act is that a receiving order shall be made only when it is for the benefit of the general body of creditors. The fact, that the making of a receiving order will produce a loss to the estate, is a "sufficient cause" for not making it.

F. Cooper Willis, for the trustees of the deed.

[BRETT, M.R. The trustees have no locus standi to be heard.]

BRETT, M.R. The only objection raised to the making of the receiving order was that a deed of arrangement between the debtors and their creditors had been executed by a certain number of the creditors, of whom the petitioning creditor was not one. The registrar did not adjourn the hearing in order that further materials or fresh evidence might be brought before him, but, having heard the petition fully, and having all the facts and arguments before him, he by way of decision adjourned the hearing sine die, in order that he might see whether the arrangement contained in the deed would work well for the benefit of all the creditors. When it is said that he was justified by s. 7 (3) in making this order, that is equivalent to saying that he was taking the first step towards dismissing the petition under that sub-section. He in effect said, "If I find that the arrangement works well, I shall dismiss the petition." The question is whether the fact that an arrangement had been entered into in this way between the debtors and some of their creditors was a "sufficient cause" within s. 7 (3) for dismissing the petition; unless it was, the registrar had no authority to dismiss the petition, or to deal with the matter by way of dismissing it. In this view of the case it appears to me that it is really decided by *Ex parte Dixon*. (1) Though the terms of the arrangement in that case were not the same as those in the present case, the

(1) 13 Q. B. D. 118.

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arrangement was entered into in the same way, before the presentation of a petition for a receiving order, by a certain number of the creditors who did not follow the steps prescribed by the Act for rendering a scheme of arrangement binding on all the creditors, and the Court said that, because the arrangement had been come to in that way, it was not a "sufficient cause" enabling the registrar to exercise the power conferred on him by s. 7 (3). The reasoning of the judges who decided *Ex parte Dixon* (1) was not founded on the particular terms of the arrangement, but on the fact that it was made at the time and in the manner in which, and by the persons by whom, it was actually made. The judgments did not proceed upon the consideration whether the terms of the arrangement were more or less beneficial to the creditors; they were based simply on this, that the arrangement was made at the time and in the manner in which, and by the persons by whom, it was made. For that reason, quite independently of the particular terms of the arrangement, the Court held that "sufficient cause" had not been shewn for not making a receiving order. That reasoning equally applies to the present case, and it shews that the registrar had no authority or jurisdiction to order the adjournment of the petition as a step toward its dismissal. His order must, therefore, be discharged.

BAGGALLAY, L.J. I have carefully reconsidered the language which I am reported to have used in *Ex parte Dixon* (1): I entirely adhere to it, and it is unnecessary for me to repeat what I then said.

BOWEN, L.J. I agree, and I have nothing to add.

Order discharged.

Solicitors for appellant: *Walker, Son, & Field.*
Solicitors for respondents: *George Davis, Son, & Co.*

(1) 13 Q. B. D. 118.

W. L. C.

BARLOW AND ANOTHER *v.* TEAL. 1885

May 19.

Landlord and Tenant—Yearly Tenancy—Half-year's Notice—Six Months' Notice, Distinction between—Agricultural Holdings Act, 1883 (46 & 47 *Vict. c.* 61), *s.* 33.

A tenancy under a written agreement from year to year "until six months notice shall have been given . . . in the usual way to determine the tenancy" is not one "where a half-year's notice . . . is by law necessary" within 46 & 47 Vict. c. 61 (the Agricultural Holdings Act, 1883), s. 33, which, therefore, does not apply so as to render a year's notice necessary for the determination of the tenancy.

APPEAL from chambers.

In an action by landlords against a tenant to recover possession of a farm, and for mesne profits, an order under Order XIV. was made by a master and affirmed by a learned judge, giving the plaintiffs leave to sign final judgment for possession of the land, and the defendant liberty to defend as to the mesne profits.

The farm was held under a written agreement "for one whole year from the 6th of April, and so on from year to year until six months' notice shall have been given by one of the said parties to the other in the usual way to determine the tenancy."

Six months' notice, expiring on the 6th of April, Old Lady Day, had been given by the landlords.

Cyril Dodd, for the defendant. There is a defence to the action for possession of the farm, and the defendant should be allowed to defend it, because no sufficient notice was given to end the tenancy. The tenant was entitled to a year's notice. By 38 & 39 Vict. c. 92 (the Agricultural Holdings Act, 1875), s. 51, "where a half-year's notice, expiring with a year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same." That section dealt only with the case where the half-year's notice was "by law" required. By s. 54, "Nothing in this Act shall prevent a landlord and tenant, or intending landlord and tenant, from entering into and carrying into effect any such agreement as they think fit." . . . But 46 & 47 Vict. c. 61 (the Agricultural Holdings Act, 1883), s. 33, after repeating the provision in s. 51 of the Act of 1875,

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and applying it to a contract of tenancy "made either before or after the commencement of this Act," adds an exception, viz., "unless the landlord and tenant of the holding, by writing under their hands, agree that this section shall not apply, in which case a half-year's notice shall continue to be sufficient." The meaning is, that a year's notice shall be given even in respect of written agreements stipulating for half a year, unless the parties in writing agree that the section shall not apply.

The agreement in this case for six months' notice in the usual way means six calendar months, which is half a year. The decision in *Wilkinson* v. *Calvert* (1), that an express agreement for six months' notice to quit to determine a yearly tenancy was not within the Agricultural Holdings Act, 1875, s. 51, was upon the language of that Act only. Moreover, in the present agreement, the parties have stipulated for "six months' notice in the usual way." This is no case for the application of Order XIV.

Kingsford, for the plaintiffs, shewed cause. Immediate possession is required, for the plaintiffs have let the premises to another tenant, and there is no defence to the action. In *Wilkinson* v. *Calvert* (1) Lord Coleridge, C.J., said (2): "It is plain that six months' notice is not half a year's notice." In the absence of express stipulation half a year's notice to quit was required "by law": Woodfall's Landlord and Tenant, 11th ed., p. 302, and 46 & 47 Vict. c. 61, s. 33, applies "where a half-year's notice . . . is by law necessary," but not to the present case, where six months' notice by the express terms of the written contract is necessary. "Six months" must either be lunar months, *Rogers* v. *Dock Co. at Kingston-upon-Hull* (3), or "customary six months": *Morgan* v. *Davies*. (4)

If this agreement were silent as to notice, or if half a year's notice were stipulated for, the Act might apply.

Cyril Dodd replied. Six months means calendar months: *Reg.* v. *Inhabitants of Chawton* (5), and therefore half a year.

LORD COLERIDGE, C.J. Whatever may have been the intention of the legislature we can only decide this case on general

(1) 3 C. P. D. 360.
(2) At p. 365.
(3) 34 L. J. (Ch.) 165.
(4) 3 C. P. D. 260.
(5) 1 Q. B. 247.

principles, and one of those general principles is, that where cases have been decided on particular forms of words, in Courts, and Acts of Parliament use those forms of words which have received judicial construction, in the absence of anything in the Acts shewing that the legislature did not mean to use the words in the sense attributed to them by the Courts, the presumption is that Parliament did so use them. Of course Parliament could, if it chose, say that six months did not mean half a year. I find that in *Wilkinson* v. *Calvert* (1) the very point was taken whether "six months" meant half a year, and I considered myself bound by the decided cases, and held that the words had not the same meaning, and that the expression in an Act "where half a year's notice is by law necessary" meant something different to "where six months notice is necessary." The facts of this case are these: The plaintiffs have brought an action to recover the land, and the defence raises the simple point whether this tenancy, which was created in writing, and is for "one whole year from the 6th of April, and so on from year to year until six months' notice shall have been given by one of the parties to the other in the usual way to determine the tenancy," is a tenancy which "by law" half a year's notice expiring with a year of the tenancy is necessary and sufficient to determine? If it *be* so, then the plaintiffs are wrong, for the tenant has not had half a year's notice. If it be *not* so the plaintiffs are right, for the Act of Parliament does not apply. It is clear from a series of cases running back as far as the time of Henry VIII., that "half a year's notice" means notice for half a year, and not for six months. If so, the parties who agreed for six months' notice to determine the tenancy have not agreed for that kind of notice to which s. 33 applies. It is so on authority. I pass by the case decided by me, although, as far as I can judge, that case was rightly decided, and I find that Buller, J., a lawyer of high authority, said in *Right* v. *Darby* (2), in the case of a letting from year to year, "It has been determined that half a year's notice to quit is necessary. This doctrine was laid down as early as in the reign of Henry VIII." We have before us the Year Book, 13 Hen. 8th, 15 b, to which Buller, J., referred, and in it the question is discussed by one of

(1) 3 C. P. D. 360. (2) 1 T. R. 159.

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the judges as to what will be necessary to put an end to the tenancy, and he says that in the case of a lease for years, and the lessor does not give notice before "le demy an," he will justify the other year, and so from year to year. So Buller, J., was perfectly right in saying (1) there should be half a year's notice to quit. He then proceeded to say: "This gives rise to another objection in this case upon the distinction between six months and half a year. The case in the Year Book requires half a year's notice, but here there is less than half a year's notice, and therefore it is bad on that ground also." That, decided so far back as the time of Lord Mansfield and Buller, J., has apparently been the view of lawyers ever since, for it is so laid down in many cases, although, indeed, Lord Kenyon in one case said that six months is half a year, but that is contrary to Buller, J., and the Year Book. Then it follows that six months' notice and half a year's notice not being the same thing, and the Act speaking of "half a year" and not six months, the notice agreed for in the present case being six months and not half a year is not within the Agricultural Holdings Act, and the tenant is entitled only to six months' notice and not a year's notice.

FIELD, J. I am of the same opinion. It is right that we should decide this case with reference to the objection raised by Mr. Dodd that in cases under Order XIV. leave should be given to defend when points of considerable doubt have to be decided; but it is very different here, where, whatever doubt I may have entertained, I think we have all the cases before us to enable us to give judgment at once, and, by doing so, we shall save the parties from expense. I believe *Wilkinson* v. *Calvert* (2) to be right and I am bound by it. The matter stands thus: The landlords have let this farm and made a contract with the tenant by which they have mutually agreed as to the time at which the landlords shall be entitled to possession, viz., "six months." The parties might have made any terms they chose. They might have said six calendar months, or six lunar months, six months, or half a year. But we must see what they have said. They have said *six months*. So far as the agreement is concerned, the

(1) 1 T. R. at p. 163. (2) 3 C. P. D. 360.

landlords are entitled to possession of the farm. But the tenant says that the contract has been altered by subsequent legislation, and it is necessary that he should have one year's notice. He says that the statute so enacts by s. 33, and he therefore will not give up the farm. We must look at s. 33 to see if the law has altered the contract. Sect. 33 does, no doubt, apply to a contract of tenancy whether before or after the Act. But Mr. Dodd's first difficulty is in the very words with which the section begins, "Where half a year's notice is by law necessary and sufficient." The words are perfectly plain. "By law." What does that mean? Where there is no stipulation to the contrary, as is laid down in *Doe* dem. *Right* v. *Darby* (1) and the Year Book. Where parties have made a contract for a year and no provision for determining it, then, in favour of agriculture, the law has said that the tenant shall not be turned out under half a year's notice. But where the parties have contracted for a certain notice then be it so. *Wilkinson* v. *Calvert* (2) is in point, and the dictum of Lord Kenyon has never received the sanction of authority. Our construction seems to me to be in accordance with the intention of the legislature, for it is a good principle that freedom of contract should not be interfered with more than is necessary for the purposes of justice.

Appeal dismissed with costs.

Solicitors for plaintiffs: *Bowlings, Foyer, & Hordern.*
Solicitors for defendant: *Pitman & Son.*

(1) 1 T. R. 159. (2) 3 C. P. D. 360.

J. R.

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June 23.

DANIEL, APPELLANT; WHITFIELD, RESPONDENT.

Bread, Sale of—Delivery by Cart without Beam and Scales—Delivery to oblige Customer—6 & 7 Wm. 4, c. 37, s. 7.

Sect. 7 of 6 & 7 Wm. 4, c. 37, provides that every baker or seller of bread, and every servant employed by such baker or seller of bread, who shall convey or carry out bread for sale in and from any cart, shall be provided with a beam and scales with proper weights, in order that all bread sold by any such baker or seller of bread, or his servant, may be weighed in the presence of the purchaser thereof; and in case any "such baker or seller of bread" or his servant shall carry out or deliver any bread without being provided with such beam and scales, every such baker or seller of bread shall be liable to a penalty.

A customer bought three loaves in a baker's shop. The baker weighed the loaves in her presence, and subsequently, at her request and to oblige her, his servant carried them out in a cart and delivered them at her house, without being provided with any beam and scales:—

Held, that the baker had not carried out or delivered the loaves as "such baker or seller of bread," and therefore could not be convicted of an offence under s. 7.

CASE stated by justices of the county of Monmouth under 20 & 21 Vict. c. 43.

The appellant was convicted before the justices on an information preferred by the respondent, a police constable, charging "that he, on the 6th day of December, 1884, did convey, carry out, and deliver bread for sale in a certain cart without being provided with a beam and scales with proper weights in order that the bread sold might be weighed by the purchaser thereof, contrary to the statute 6 & 7 Wm. 4, c. 37, s. 7." (1)

(1) Sect. 6 of 6 & 7 Wm. 4, c. 37, enacts that "every baker or seller of bread beyond the limits aforesaid (the city of London and the liberties thereof and beyond the weekly bills of mortality and ten miles from the Royal Exchange) shall cause to be fixed in some conspicuous part of his, her, or their shop on or near the counter a beam and scales with proper weights or other sufficient balance, in order that all bread there sold may from time to time be weighed in the presence of the purchaser or purchasers thereof," under a penalty.

Sect. 7 enacts that "every baker or seller of bread beyond the limits aforesaid, and every journeyman, servant, or other person employed by such baker or seller of bread, who shall convey or carry out bread for sale in and from any cart or other carriage, shall be provided with, and shall constantly carry in such cart or other carriage a correct beam and scales with proper weights, or other sufficient balance, in order that all bread sold by every such baker or seller of bread, or by his or her journeyman, servant, or other person, may from

The facts proved before the justices were stated in the case as follows:—

"The appellant, John Daniel, is a grocer and provision dealer carrying on business at his shops at Pontypool and Abersychan. On Dec. 6 one Mary Ann Smith, a customer of the appellant, called at his shop and purchased three loaves, which were weighed by the appellant in her presence; and to oblige her she requested the appellant to send them to her home with other goods which she had purchased. Police constable Thomas O'Donnell on Saturday, Dec. 6, saw a man, William Evans, delivering bread at the house of the said Mary Ann Smith (who resides about three miles from Pontypool) from a cart belonging to the appellant, and it was admitted on the part of the appellant that there were no beam and scales with the cart."

The justices also stated: "We were satisfied that the bread was sold at the shop of the appellant, but we were not satisfied that the bread was delivered at the shop, and we decided therefore that the not having the beam and scales in the cart at the time of the delivery of the bread was an offence within the meaning of the statute, and we accordingly convicted the appellant in a penalty of 10*s*."

If the justices' decision was right the conviction was to stand: if otherwise, the summons was to be dismissed.

A. T. Lawrence (*Acland* with him), for the appellant. The appellant upon the facts stated in the case did not convey or carry out bread within the meaning of the latter part of s. 7 of

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time to time be weighed in the presence of the purchaser or purchasers thereof, except as aforesaid: And in case any such baker or seller of bread, or his or her journeyman, servant, or other person, shall at any time carry out or deliver any bread without being provided with such beam and scales with proper weights, or other sufficient balance, or whose weights shall be deficient in their due weight according to the standard in the Exchequer, or shall at any time refuse to weigh any bread purchased of him, her, or them, or delivered by his, her, or their journeyman, servant, or other person, in the presence of the person or persons purchasing or receiving the same, then and in every such case every such baker or seller of bread shall for every such offence forfeit and pay any sum not exceeding five pounds, which the magistrate or magistrates, justice or justices, before whom such offender or offenders shall be convicted shall order and direct."

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6 & 7 Will. 4, c. 37, and therefore was not liable to be convicted. In order to be made liable, he must carry out the bread, as "such baker or seller of bread," which words are intended to run through and govern the whole of the section. The dicta of Bramwell, B., in *Robinson* v. *Cliff* (1) go too far. No case has gone the length of saying that the baker is liable to conviction where the bread is appropriated to the buyer in the shop, weighed there, and afterwards delivered at the buyer's house. Hawkins, J., in *Ridgway* v. *Ward* (2), expresses his opinion to the contrary. Grove, J., in the same case guards himself from being supposed to decide the point.

Mattinson, for the respondent. The object of the statute being to protect persons who buy bread by weight, that which was done by the appellant here came within the mischief aimed at, because other loaves might be substituted for those weighed in the shop. The latter part of s. 7 intends to deal with cases in which bread is sold at the shop, and afterwards delivered at the buyer's house; and the justices have not found that there was a complete delivery at the shop. It is admitted that there is no authority directly in point; but the dicta of Bramwell, B., and Mellor, J., in *Robinson* v. *Cliff* (1), and Grove, J., in *Ridgway* v. *Ward* (3), support the respondents' contention, though Hawkins, J., in the latter case no doubt took the contrary view. The appellant carried out and delivered bread in a cart without weights and scales, and is therefore brought within the words of the latter part of s. 7.

FIELD, J. This case raises a much debated question with respect to the circumstances under which a baker who delivers bread is bound to put a beam and scales with proper weights in his cart. The question arises under 6 & 7 Wm. 4, c. 37, and it is material to consider the 6th and 7th sections of that statute. The 6th section is not of great direct importance, but it may usefully be referred to in order to see what is the scheme of legislation, and what the protection intended to be afforded to buyers of bread. It is obvious that in both sections the scheme of legislation is based upon the supposition that bakers are in the

(1) 1 Ex. D. at pp. 297, 298. (2) 14 Q. B. D. at p. 120.
(3) 14 Q. B. D. 110.

habit of delivering bread under the proper weight. The legislature has therefore determined that there shall be a check upon that practice, and provided a mode of check which shall leave no ground of dispute between the buyer of bread and the baker. That mode is applied to the different circumstances under which bread is usually sold and delivered. In the simplest case, namely, where loaves are sold and delivered in the shop, in order to secure that the buyer shall have full weight for his money, the 6th section provides that bakers who sell bread in a shop shall have a proper beam and scales with weights, "in order that all bread there sold may from time to time be weighed in the presence of the purchaser or purchasers thereof." That enactment clearly applies where bread is sold and delivered at the shop, and taken away by the buyer. Sect. 7 enacts that every baker or seller of bread in the country, and every journeyman, servant, or other person employed by such baker or seller of bread, "who shall convey or carry out bread for sale in and from any cart or other carriage," shall be provided with, and shall constantly carry on such cart or carriage, a beam and scales with proper weights, in order that the bread may be weighed in the presence of the buyer. Now, a considerable conflict of judicial opinion has arisen upon the words "shall convey or carry out bread for sale in and from any cart or other carriage." In *Robinson* v. *Cliff* (1), Denman, J., held that those words were only inserted in s. 7 in order to prevent it from extending to cases where the bread was merely in transit from one place to another, or was being taken out for charitable purposes, or where it was being carried about for delivery in baskets without a cart. But the general opinion seems to be that under that part of the section the necessity for beams, weights and scales only arises when the bread is conveyed or carried out in a cart for sale away from the shop. But that part of the section is not relied on here. The bread was not sent out for sale. The justices have found that it was sold at the shop, though they have not found that it was delivered there. The section then goes on to deal with another matter which has also caused a conflict of judicial opinion: "And in case any such baker or seller of bread, or his or her journeyman, &c., shall at any time carry out or deliver any bread" without

(1) 1 Ex. D. 294, at p. 298.

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being provided with the proper weighing apparatus, "then and in every such case, every such baker or seller of bread" shall be subject to a penalty. Now in this part of the section the words "for sale" are omitted after the words "carry out or deliver any bread," and it is under this part of the section that the justices have acted. They have considered that, although there was a sale at the shop, something yet remained to be done, namely, to carry out and deliver the bread, and that if there was not in fact what was equivalent to a delivery at the shop, the case would then fall within the observations upon the construction of s. 7 made by Bramwell, B., in *Robinson* v. *Cliff* (1), and Grove, J., in *Ridgway* v. *Ward* (2), because in the present case the baker did undoubtedly in fact carry out and deliver the bread to the customer without having a beam, weights, and scales with the cart. But I am of opinion that that construction of the section is too narrow. A mere de facto carrying out and delivering is not sufficient to bring the case within the Act. There must in my opinion be a carrying out and delivery "as such baker or seller of bread." Though the case is not clearly stated, I think upon the facts which appear the appellant did not carry out and deliver the bread as "such baker or seller of bread." The facts of this case are wholly different from those in the cases cited in argument. In *Robinson* v. *Cliff* (1) the customer had given a general order for bread to the baker, and in pursuance of that order the baker went round with his cart and asked her how much she required. She replied, "two stones," and the baker thereupon supplied the bread from his cart, not being provided with scales and weights. Upon those facts I should have no difficulty in saying that the conviction was right. There was no sale of that specific bread otherwise than from the cart, and the transaction was quite within the mischief which the statute intended to prevent. In *Ridgway* v. *Ward* (2) the facts were nearer those in the present case. The order was given through the baker's traveller, and the baker selected, weighed, and appropriated the bread to the customer, and then sent out and delivered it in his cart. The buyer had no opportunity of having the bread weighed in his presence. In that case also I should have had no difficulty in coming to the

(1) 1 Ex. D. 294. (2) 14 Q. B. D. 110.

conclusion that an offence had been committed against the Act. Grove, J., in his judgment, said that the object of the Act evidently was, that when bread was delivered to a customer he should have the opportunity of seeing it weighed, and went on to suggest a case which might occur. "Suppose," he said, "the purchaser in the present case actually saw a quartern loaf weighed and put aside in the shop, and a quartern loaf was afterwards sent to her, the object of the Act would not be attained unless she could see that quartern loaf weighed at her house. But I need not consider such a case," &c. It is obvious that he did not decide the point. Indeed, he guards himself from saying what his decision would be upon it if it arose. Hawkins, J., also suggested a possible case, and stated his opinion that if a purchaser sent her servant and said, "You see the bread weighed and set aside," and the servant did so, that would be a perfect contract of sale and delivery; and the learned Judge said, "suppose that after seeing it weighed the servant had told the baker to cut a notch in it so that it might be identified, and he had done so, then under such circumstances, the loaf having been bought, appropriated, set aside, and paid for, any transmission of it to the customer as a favour or otherwise would not be carrying out and delivering it within the meaning of the Act." Now, do the facts here bring the case within the meaning of the Act? It is found that the customer bought these loaves at the appellant's shop, and they were weighed by him in her presence. Therefore the requirements of s. 6 were absolutely complied with. The case also finds that the customer requested the appellant, to oblige her, to send the loaves home with other goods she had purchased. I think the proper inference is that she had bought the loaves in the shop; that they were set apart for her, and that the subsequent delivery at her house was only made as a matter of favour to a customer. It is true that the justices say they were not satisfied that the bread was delivered at the shop. I think that must mean they were not satisfied that, upon the facts stated before in the case, what had happened at the shop constituted delivery. They may have thought that there could not be a delivery within the Act until the goods were taken to the customer's house. But there might be a perfectly good delivery within the Act if everything was done at the shop

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to complete the delivery to the customer, and the subsequent delivery at the house would then be a mere friendly office. I am therefore of opinion that no offence was committed within the Act. There was no dishonesty on the part of the appellant, and it would be very dangerous to hold that because he was willing to oblige his customer he was, under the circumstances, guilty of an offence under s. 7.

MANISTY, J. I am of the same opinion, and the conclusion at which I have arrived does not conflict with any of the cases cited. This case stands perfectly free from authority, though there may be dicta in the other cases which appear to conflict with my view of the construction of the Act. Sect. 7 points out what is to be done by "every baker or seller of bread who shall carry out bread for sale in and from any cart," and provides that he shall be provided with beams, scales and weights, in order that all bread sold by "every such baker or seller of bread" may be weighed in the presence of the purchaser. The section assumes that the bread will be conveyed or carried out in a cart for sale and delivery to customers. In my view, the subsequent part of the section only imposes a penalty for breach of the previous provisions. The words "and in case any such baker or seller of bread" mean "in case any such baker or seller of bread who conveys and carries out bread for sale." The legislature, I think, cannot have meant to include cases in which bread is sold at the shop, appropriated there, and subsequently sent by the baker to the customer's house. Some limit must be put upon the section. I do not think that the legislature contemplated a case like the present, where the bread was sold, weighed, and appropriated in the shop, and then the appellant at the request of the customer, and to oblige her, sent it with other goods to her house. I am of opinion that the appellant is entitled to judgment.

Judgment for the appellant.

Solicitors for appellant: *Few & Co., for Greenway & Bythway, Pontypool.*

Solicitors for respondent: *Johnstone, Harrison, & Powell.*

W. A.

THE LONDON SCHOOL BOARD, APPELLANTS; WOOD, RESPONDENT. 1885 *July* 2.

Elementary Education—Board Schools—Non-payment of Fees for Tuition—Causing Child to attend School, what is—By-law—Penalty—Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75), *s.* 74.

The London School Board made by-laws, under s. 74 of the Elementary Education Act, 1870, providing that the parent of every child, if not less than five nor more than thirteen years of age, should cause such child to attend school unless there was a reasonable cause for non-attendance, and that every parent who should not observe or neglect any by-law should be liable upon conviction to a penalty.

The respondent sent his child, aged ten, to one of the Board's schools, but did not pay, though he was able to pay, the weekly fees for tuition prescribed by the School Board with the consent of the Education Department. The child was admitted to the school, and received instruction therein:—

Held, that the respondent had not caused his child to attend school within the meaning of the by-laws, and therefore was liable to the penalty.

CASE stated by one of the magistrates of the Marylebone Police Court, under 20 & 21 Vict. c. 43.

A summons was taken out by one of the officers of the London School Board, the appellants, charging that the respondent, "residing within the appellants' district, and being the parent of a child residing with him and being not less than five nor more than thirteen years of age, did unlawfully neglect and omit to cause the said child to attend school on the 2nd and 9th days of September, 1884, and on divers other days, as required by the by-laws of the appellants, there being no reasonable excuse for such non-attendance according to the said by-laws."

The following facts were proved at the hearing of the summons:—

The child in question, being of the age of ten years, was sent by the respondent to the Board school in Mansfield Place on the 2nd and 9th days of September, but the respondent did not pay the fee of 1*d.* due and payable on each of those days respectively, being the weekly fee prescribed by the School Board with the consent of the Education Department.

The respondent was in a position to pay the above-mentioned fees, but at the time of the hearing of the summons they had not been paid.

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The child was not excluded from the school by reason of the non-payment, but was admitted thereto and received instruction therein.

It was contended for the appellants that the respondent, by not causing the child to attend the school with the fee, had committed a breach of a by-law made by the appellants under the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 74, as amended by the Elementary Education Act, 1876 (39 & 40 Vict. c. 79) (1), and had made himself liable to a penalty, and that his offence against the by-law being thus complete, the subsequent conduct of the appellants in admitting and instructing the child were mere acts of grace, and could not affect the respondent's liability. The appellants relied on the terms of the judgments in *Saunders* v. *Richardson* (2) and *London School Board* v. *Wright*. (3)

The respondent did not appear.

The magistrate was of opinion that the respondent having sent the child, and the child having been in fact admitted into the school and received education therein, the respondent could not be convicted of wilfully omitting and neglecting to cause the child to attend school within the meaning of the by-law, and that the cases cited did not apply. He therefore dismissed the summons.

(1) Sect. 74 of 33 & 34 Vict. c. 75 enacts that any school board may from time to time with the approval of the Education Department make by-laws for the purposes (inter alia) of (1) "requiring the parents of children of such age, not less than five years nor more than thirteen years, as may be fixed by the by-laws, to cause such children (unless there is some reasonable excuse) to attend school;" and (4) "imposing penalties for the breach of any by-laws:" And the same section, after specifying what shall be reasonable excuses, provides that proceedings to enforce any by-law may be taken, and any penalty for the breach of any by-law may be recovered, in a summary manner.

The 2nd of the by-laws, made by the London School Board under s. 74, provides that the parent of every child, if not less than five nor more than thirteen years of age, shall cause such child to attend a certified efficient school, unless there is a reasonable cause for non-attendance; and the 4th provides that every parent who shall not observe, or neglect or violate, the by-laws then made, or any of them, shall upon conviction be liable to a penalty not exceeding with the costs 5*s*. for each offence.

(2) 7 Q. B. D. 388.

(3) 12 Q. B. D. 578.

The question for the opinion of the Court was whether the magistrate was right in so dismissing the summons. If his decision was right the dismissal was to stand. If his decision was wrong the case was to be remitted to him, to be dealt with according to law.

Sir F. Herschell, Q.C. (*Arnold Forster*, with him), for the appellants. The respondent did not effectively cause his child to attend school within the meaning of s. 74 of the Elementary Education Act, 1870, and the 2nd by-law of the London School Board. This case is decided in principle by *Saunders* v. *Richardson* (1) and *London School Board* v. *Wright*. (2) The only distinction between *Saunders* v. *Richardson* (1) and this case is that here the child was admitted to the school and received instruction, but those facts do not distinguish it in principle from *Saunders* v. *Richardson*. (1) In *London School Board* v. *Wright* (2) the child was admitted and received instruction without payment of the fees, and the Court of Appeal held that no action would lie to recover the fees, one of the grounds of their decision being that the parent was liable to the penalty for breach of the by-law. The Court seem to have been clearly of opinion that the parent had not caused the child to attend school.

The respondent did not appear.

LORD COLERIDGE, C.J. I am of opinion that the decision of the magistrate was wrong. It was distinctly held in *Saunders* v. *Richardson* (1) that a parent did not cause his child to attend school by sending her to the door of the school, from whence she was sent away by the master because she was not provided with the school fees: and in *London School Board* v. *Wright* (2) it was the unanimous opinion of the Court of Appeal (although perhaps it was not strictly necessary to decide the point) that when a child had been sent to school, and had there received tuition for some weeks without the school fees having been paid, the parent had not effectively caused the child to attend school. The decision was that no contract could be implied by the parent to pay the fees, and no action would lie against him to recover them. But

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the Court pointed out that their judgment would not have the effect of rendering the statute inoperative, so that a parent who sent his child to school without paying the fees for the instruction given to the child could escape all liability, because—and this was one of their reasons for holding that no contract could be implied—the statute provided a remedy by imposing a penalty upon the parent for failing to cause the child to attend school. The Court thought that, although the father had in fact sent the child to school, and she had in fact received instruction, yet the father had not caused the child to attend school within the by-law. I am of opinion, looking at these two cases, that the question raised by the case should be answered in the negative, and that the father has not, within the meaning of the statute and the by-law, caused his child to attend school, because he has not performed the condition precedent to an effective attendance of paying the school fees. He has, therefore, committed a breach of the provisions of the Act and the by-law, and thereby rendered himself liable to the penalty.

GROVE, J. I am of the same opinion. All that the parent did was to send his child to the school, although he knew, or must be taken to have known, that he had not provided that which was necessary in order to obtain instruction, and that the child, except for the good nature of the master, would not receive that instruction. He caused the child to go to the school unprovided with that which was necessary in order to compel the master to give instruction.

DENMAN, J. I am of the same opinion. I think that the doctrine of *London School Board* v. *Wright* (1) covers this case, because the judgment delivered by Baggallay, L.J., clearly lays down the proposition that a parent does not cause his child to attend school by sending it there unprovided with the school fees, although the child is allowed to enter the school and receive instruction on several occasions. The present case seems to be a corollary of *Saunders* v. *Richardson* (2), where a Court of five judges unanimously decided that sending a child to school

(1) 12 Q. B. D. 578. (2) 7 Q. B. D. 388.

unprovided with the fees was not causing the child to attend school. Here the child was by the good nature of the teacher admitted into the school, and given instruction. In my judgment it would be fallacious to attribute to the parent the act of causing the child to attend school, having regard to the definition of attending school in *Saunders* v. *Richardson*. (1) It was not suggested in this case that there was any reasonable excuse within the meaning of the Act and by-law for the failure of the parent to cause the child to attend school. I do not say that the act of the master in admitting the child to the school without payment of the fees might not in some possible cases afford a reasonable excuse to the parent, as, for instance, if the master told the parent, "You may pay the fees when the child has attended school twenty times." Here there was no reasonable excuse.

MATHEW, J. I am of the same opinion. The object of the Act is to compel the parent to provide for the education of his child. In my opinion he no more provided for her education by sending her to school without the fees, than he would have provided for her support if he sent her to be maintained by charity.

Judgment for the appellants. Case remitted.

Solicitors for appellants: *Gedge, Kirby, & Millett.*

(1) 7 Q. B. D. 388.

W. A.

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July 31.

[IN THE COURT OF APPEAL.]

IN RE BROAD AND BROAD.

Solicitor and Client—Costs—Taxation—Costs of Third Counsel on Appeal.

The rule laid down in *In re Blyth and Fanshawe* (10 Q. B. D. 207) applies to the costs of employing a third counsel on the hearing of an appeal, the expense being an unusual one.

Therefore, even if a solicitor has obtained his client's sanction to the employment of a third counsel on an appeal, the costs will not be allowed on taxation between solicitor and client, unless the solicitor has also explained to the client that the costs will probably not be allowed as between party and party, and that, even if he succeeds on his appeal, he may have to pay the costs of the third counsel himself.

Decision of Divisional Court (15 Q. B. D. 252) affirmed.

APPEAL from the refusal of a Divisional Court (Field and Manisty, JJ.), to direct the master to review a taxation of costs. The decision of the Divisional Court is reported (15 Q. B. D. 252), where the facts are fully stated. It is sufficient now to state that, on a taxation of costs as between solicitor and client, the master disallowed the fees and other costs of a third counsel, who had been employed by the solicitors on the hearing of an appeal by the client. These costs had been previously disallowed on a taxation as between party and party. The ground of the disallowance was that, though the solicitors had informed the client of the proposed retainer of a third counsel, and obtained his sanction thereto, they had not pointed out to the client that these costs might possibly not be allowed on taxation between party and party, and that, even if he was successful in his appeal, he might have to pay these costs himself. The master held that the case was governed by *In re Blyth and Fanshawe* (1), and that he had no discretion in the matter.

Lopes, J., at Chambers, and afterwards the Divisional Court, affirmed the decision of the master on the same ground.

The solicitors appealed.

Dunham, for the appellants. *In re Blyth and Fanshawe* (1) is

(1) 10 Q. B. D. 207.

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distinguishable. The question there was as to allowing the costs of taking shorthand notes of evidence. There is a positive rule that such costs will not be allowed as between party and party, unless a special direction is given by the Court at the trial: *Earl De La Warr* v. *Miles* (1). There is no such rule as to the costs of employing a third counsel; but the taxing-master has a discretion.

The rule laid down in *In re Blyth and Fanshawe* (2) applies only to a case in which the costs in question must necessarily be disallowed as between party and party; not to a case in which it is only possible that they may be disallowed. There is no such rigid rule as the master supposed, but he had a discretion as to allowing these costs, and he has not exercised any discretion at all. The nature of the case made it proper to employ a third counsel on the appeal.

J. Lawson Walton, for the client, was not heard.

LORD ESHER, M.R. A more wholesome rule than that which was laid down in *In re Blyth and Fanshawe* (2) I never heard of. The rule was laid down by this Court, and it does not require my authority to support it. What then is the rule? It is thus expressed by Baggallay, L.J.: "I take it to be the general rule of law, and an important rule which is to be observed in almost all cases, that, if an unusual expense is about to be incurred in the course of an action, it is the duty of the solicitor to inform his client fully of it, and not to be satisfied simply by taking his authority to incur the additional expense, but to point out to him that such expense will or may not be allowed on taxation between party and party, whatever may be the result of the trial." There the rule was applied to the costs of shorthand notes of the evidence at the trial; here the question is as to the costs of employing a third counsel on the hearing of an appeal. Is this "an unusual expense?" To my mind it is unusual in ninety-nine cases out of a hundred. As only two counsel can be heard in the Court of Appeal, what is the use of a third? It is unusual to employ a third counsel on an appeal, and therefore it is not enough for the

(1) 19 Ch. D. 80. (2) 10 Q. B. D. at p. 210.

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solicitor to tell the client that he proposes retaining a third counsel, and to obtain his sanction; that is really telling him nothing at all. He ought to tell the client, "the expense of employing a third counsel will probably not be allowed as between party and party, and, therefore, whether you win or lose your appeal, you may have to pay the expense yourself." I am by no means sure that, if the client were told this, he would say, "Never mind; I will pay it." The case is directly within the rule laid down in *In re Blyth and Fanshawe* (1), which, in my opinion, is an exceedingly good rule. I think the master acted quite rightly. It is said that he exercised no discretion. He very properly took notice of the fact that the rule is one "which is to be observed in almost all cases," and he exercised his judgment in saying that there were no exceptional circumstances justifying the employment of three counsel.

BAGGALLAY, L.J. I adhere to the opinion which I expressed in *In re Blyth and Fanshawe.* (1)

Appeal dismissed.

Solicitors for appellants: *Broad & Broad.*
Solicitors for client: *Sandom, Kersey, & Knight.*

(1) 10 Q. B. D. at p. 210.

W. L. C.

[IN THE COURT OF APPEAL.]

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July 31.

SYKES *v.* SACERDOTI.

Practice—Security for Costs—Counter-claim—Defendant out of Jurisdiction.

Where a claim and counter-claim arise out of different matters, so that the counter-claim is really in the nature of a cross action, the defendant, if he is residing out of the jurisdiction, may be required to give security for the plaintiff's costs of the counter-claim, and, if the only dispute remaining arises on the counter-claim, it is beyond doubt right that he should be so required.

APPEAL from an order of a Divisional Court, that the defendant's counter-claim should be stayed, until he should give security for the costs thereof to the satisfaction of the master.

The plaintiff was a solicitor in London; the defendant was a foreigner residing in Berlin. The writ was issued on the 27th of February, 1885, and was specially indorsed with a claim for 479*l.* 5*s.* 4*d.* for solicitor's costs, and 107*l.* 0*s.* 2*d.* for money lent to the defendant. The plaintiff applied for leave to sign final judgment under Order XIV., and on the 20th of April an order was made that, if the defendant should give security for, or pay into court, within ten days from the date of the order, the sum of 479*l.* 5*s.* 4*d.*, he should be at liberty to defend the action as to the whole of the plaintiff's claim; if that sum was not paid, or security was not given, the plaintiff was to be at liberty to sign judgment for that sum, subject to taxation, and the defendant was to be at liberty to defend the action as to the residue of the plaintiff's claim. The defendant on this occasion made an affidavit in which he said that he intended to counter-claim against the plaintiff for negligence as his solicitor. The time for complying with the order was afterwards extended, but no money was paid into court or security given, and on the 22nd of May, 1885, the plaintiff signed final judgment for 479*l.* 5*s.* 4*d.*, subject to taxation. On the 20th of May the defendant had delivered a defence and counter-claim, in which he denied that he was indebted to the plaintiff at all, and counter-claimed against the plaintiff for more than 10,000*l.*, damages alleged to have been caused to the defendant by the plaintiff's negligence as his solicitor. On the

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12th of June, 1885, an order was made by the master to strike out certain paragraphs of the defence, so far as they related to the sum of 479*l.* 5*s.* 4*d.*, for which the plaintiff had already signed judgment; giving the plaintiff leave to discontinue the action so far as it related to his claim for £107 0*s.* 2*d.*; and ordering that the defendant's counter-claim should be stayed, until he should give security for the costs thereof to the satisfaction of the master. This order was on the 15th of June affirmed by Lopes, J., and his order was on the 22nd of June affirmed by the Divisional Court (Grove and Denman, JJ.)

The defendant appealed.

A. Cock, for the appellant. The rule of the Court is to require a plaintiff, who is residing out of the jurisdiction, to give security for costs; he comes voluntarily to the Court, and the Court will not give him relief until he has secured the defendant against the possible loss of the costs of the action. But a defendant is brought into court against his will by the plaintiff, and the same principle does not apply. A counter-claim is merely a mode of defence. The plaintiff in a cross suit in the Court of Chancery was not required to give security for costs if he was out of the jurisdiction: *Macgregor* v. *Shaw*. (1) In *Mapleson* v. *Masini* (2) it was held that a defendant, who was a foreigner residing abroad, could not be ordered to give security for the costs of his counter-claim.

[LORD ESHER, M.R. The ground of the decision there was that both claim and counter-claim arose out of the same transaction.]

Winterfield v. *Bradnum* (3) does not apply.

Clifford, for the plaintiff, was not heard.

LORD ESHER, M.R. As matters now stand the only person who is really a plaintiff is the original defendant—the actor in the counter-claim. The original plaintiff is defendant to the counter-claim, which is in the nature of a cross action. We need not now consider whether, when a counter-claim arises out of the

(1) 2 De G. & Sm. 360. (2) 5 Q. B. D. 144.
(3) 3 Q. B. D. 324.

same matter as the claim (as it did in *Mapleson* v. *Masini* (1)) the defendant ought to be required to give security for costs on the ground that he is out of the jurisdiction. The present case appears to me to be identical in principle with *Winterfield* v. *Bradnum*. (2) I am still firmly of opinion that, when a claim and a counter-claim arise out of different matters, the counter-claim is really a cross action, though for convenience of procedure the two are joined together, and are to be tried at the same time. In such a case the ordinary rule applies, and the Court is entitled to require the defendant, who is really an actor as regards the counter-claim, to give security, if he is out of the jurisdiction, for the costs which will be occasioned to the plaintiff by his counter-claim. In the present case the only issue remaining on the record is an issue on the counter-claim, which makes the case certain, both as to the jurisdiction to make the order which has been made, and as to the exercise of discretion in making it.

BAGGALLAY, L.J. I am of the same opinion.

Appeal dismissed.

Solicitor for plaintiff: *J. W. Sykes.*
Solicitors for defendant: *Thomas & Hick.*

(1) 5 Q. B. D. 144. (2) 3 Q. B. D. 324.

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[IN THE COURT OF APPEAL.]

IN RE AN ARBITRATION BETWEEN DAWDY AND HARTCUP.

Submission to Arbitration—Rule of Court—Agreement to appoint Valuers—Landlord and Tenant—Valuation on Expiration of Tenancy—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 17.

An agreement between landlord and tenant for the letting of a farm provided, that the tenant should be paid at the expiration of the tenancy the usual and customary valuation, as between outgoing and incoming tenant, in the same manner as he paid on entering the premises. And it was thereby mutually agreed by and between the parties thereto, that, when any valuation of the covenants should be made between the tenant and the landlord, or his incoming tenant, the persons making such valuation should take into consideration the state, condition, and usage of the farm, and, if not left in a proper and creditable state, should determine what sum of money should be paid to the landlord as compensation therefor, and should deduct such sum from the amount of the valuation. On the expiration of the tenancy, there being no incoming tenant, the landlord and tenant respectively appointed a valuer. The valuers could not agree upon the amount of the valuation, and they appointed an umpire, who held a sitting and heard witnesses, and then made and published an award in writing. The tenant, with the view of obtaining an order remitting the matters in dispute to the umpire for reconsideration, applied for an order to make the submission to arbitration contained in the agreement, together with the appointment of arbitrators and umpire, a rule of court, under s. 17 of the Common Law Procedure Act, 1854:—

Held, that the agreement did not contain any submission to arbitration, but that it provided only for the appointment of valuers, and that it could not, therefore, be made a rule of court.

In re Hopper (Law Rep. 2 Q. B. 367) explained and distinguished.

APPEAL from the refusal by a Divisional Court of an application to make a submission to arbitration a rule of court.

On the 4th of October, 1882, an agreement in writing was entered into between William Hartcup and Edward Dawdy, whereby Hartcup agreed to let, and Dawdy agreed to hire, a farm, called the Uplands Hall Farm, at Bungay, in the county of Suffolk, from the 11th of October, 1882, for the term of twelve years, determinable nevertheless at Michaelmas in any one year by six calendar months previous notice in writing on either side, at the rent, and under and subject to the covenants and conditions, in the agreement contained. The agreement contained the following clause: "that the tenant shall be paid at the expiration of the tenancy the usual and customary valuation, as between outgoing

and incoming tenant, in the same manner as he paid upon entering the premises. And it is hereby mutually agreed and declared by and between the parties hereto, that, when any valuation of the covenants shall be made between the tenant and the landlord, or his incoming tenant, the persons making such valuation shall take into consideration the state, condition, and usage of the said lands and premises, and, if not left in a proper and creditable state, shall determine what sum of money shall be paid to the landlord as compensation therefor, and shall deduct such sum from the amount of the said valuation."

On the 11th of October, 1884, Dawdy's tenancy of the farm expired in pursuance of notice given by him, and shortly before the 11th of October, 1884, in accordance with the custom of the county of Suffolk, two valuers were appointed by the landlord and tenant respectively, for the purpose of ascertaining the amount to be paid by the landlord to the outgoing tenant. The landlord had not obtained another tenant to take the farm. The valuers could not agree upon the amount of the valuation, and they appointed an umpire. On the 15th of October, 1884, the umpire, after holding a sitting, at which both the valuers attended, and witnesses were examined on both sides, made and published his award in writing, awarding the sum of 761*l.* 5*s.* 9*d.* as the amount of the valuation to be paid by the landlord to the outgoing tenant. The umpire afterwards considered that he had made a mistake in the calculations on which his award was founded, and he made and published another award in writing, awarding the sum of 877*l.* 5*s.* 9*d.* as the amount of the valuation to be paid by the landlord to the tenant. The landlord insisted that the umpire had no power to alter his first award.

The tenant took out a summons in chambers, asking that the submission contained in the agreement of the 4th of October, 1882, together with the appointment of arbitrators and umpire, might be made a rule of court, the object being afterwards to obtain an order remitting the matters in question between the parties to the umpire for reconsideration, in order that the first award might be corrected.

The master refused the application, and his decision was affirmed by Lopes, J., in chambers.

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The tenant appealed to the Divisional Court.

June 18. *Candy*, for the appellant, was stopped by the Court.

Muir Mackenzie, for the landlord. The agreement contains no submission to arbitration; there is only a provision for valuation; it cannot, therefore, be made a rule of court. Each party asked a valuer to act for him before any dispute had arisen between them: *Collins* v. *Collins*. (1)

[MATHEW, J. Cannot there be a provision for reference to arbitration by anticipation of disputes which may arise?]

There may be, but the agreement in the present case contains no such submission. There is no submission which can be made a rule of court: *Ex parte Glaysher* (2); *Bos* v. *Helsham*. (3)

Candy, in reply. The agreement clearly contemplates that there may be a difference as to the amount of compensation. The Court will lean towards the settling of disputes by arbitration, if it can be inferred from the language of the agreement as a whole that a submission to arbitration was intended: *In re Willcox & Storkey* (4); *Bos* v. *Helsham* (3); *In re Hopper*. (5)

MATHEW, J. This application must be refused. The objection is that there is no submission to arbitration within the meaning of the statute, but only an agreement for valuation. When parties agree that valuers shall ascertain the amount to be paid under an agreement, that is merely an agreement for valuation. There has been nothing here but the customary valuation, of which the appointment of an umpire in case of difference is an ordinary incident. There are two parts of the agreement, and the earlier part is an agreement for valuation only, though the latter part seems to me to be a provision for arbitration. But, as part of the umpire's duties were those of a valuer pure and simple, I do not think that it is a submission which can be made a rule of court. The application must be dismissed with costs.

LORD COLERIDGE, C.J. I am of the same opinion, and for the same reasons.

(1) 26 Beav. 306.
(2) 3 H. & C. 442.
(3) Law Rep. 2 Ex. 72.
(4) Law Rep. 1 C. P. 671.
(5) Law Rep. 2 Q. B. 367.

The tenant appealed.

July 31. *Candy*, for the appellant. The agreement provides that at the expiration of the tenancy the "usual and customary valuation" shall be made, and this implies that the valuation is to be conducted according to the usual and customary rules, and by persons appointed in the usual and customary way. The usual and customary mode of making such a valuation is by appointing two valuers, who appoint an umpire if they cannot agree. The subsequent words of the agreement contemplate the possibility of a dispute between the landlord and the tenant. There is a sufficient submission to arbitration. The agreement cannot be split up into two parts, as Mathew, J., thought. There is an agreement in writing, and, that being so, the Court may look at the subsequent proceedings which are implied in the original agreement: *Turner* v. *Goulden* (1); *In re Wilson and Storkey* (2); *In re Hopper* (3); *Bos* v. *Helsham*. (4)

Muir Mackenzie, for the landlord, was not heard.

LORD ESHER, M.R. The only question which we have to decide is, whether there is any submission in writing to arbitration which can be made a rule of court under the provisions of s. 17 of the Common Law Procedure Act, 1854. That there was in this case in point of fact ultimately an arbitration between the parties I do not doubt; an umpire was appointed, and he had to arbitrate: the question is whether there ever was a written submission to arbitration. It has been admitted by Mr. Candy in his very strenuous and able argument that, unless the agreement of the 4th of October, 1882, contains a submission to arbitration, there has been no agreement in writing between the parties to submit the matters in dispute between them to arbitration. The only appointment of an umpire was a verbal one. The word "arbitration" in s. 17 of the Common Law Procedure Act has been construed as meaning an arbitration to be conducted according to judicial rules, where the person who is appointed arbitrator is bound to hear the parties, to hear evidence if they desire it, and

(1) Law Rep. 9 C. P. 57.
(2) Law Rep. 1 C. P. 671.
(3) Law Rep. 2 Q. B. 367.
(4) Law Rep. 2 Ex. 72.

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to determine judicially between them. He must have a matter before him which he is to consider judicially. As a consequence of this, it has been held that if a man is, on account of his skill in such matters, appointed to make a valuation, in such a manner that in making it he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge, and his skill, he is not acting judicially; he is using the skill of a valuer, not of a judge. In the same way, if two persons are appointed for a similar purpose, they are not arbitrators, but only valuers. They have to determine the matter by using solely their own eyes, and knowledge, and skill. We must, therefore, look at the agreement and see whether one or more persons are appointed to value, and in what way they are to act. The agreement says that there is to be the usual and customary valuation, but there is nothing to shew the mode in which, or the persons by whom, the valuation is to be made. It means nothing more than that the usual and customary items are to be taken into account. Then it says, that when any valuation of the covenants shall be made between the tenant and the landlord, or his incoming tenant, the persons making the valuation shall take into consideration certain specified matters. I think the agreement contemplates the making of the valuation by the landlord and the tenant themselves; at any rate, the possibility of their making it. Obviously there are to be two persons, but I can see nothing in the first part of the clause other than this, that two persons are to be appointed as valuers, not arbitrators; that they are to be valuers in the ordinary sense of the word, i.e., persons skilled in agriculture, who can determine the whole matter by the use of their own eyes, and knowledge, and skill. There is nothing to shew that they are to hear the parties, and determine judicially between them. The case comes within the authority of *Collins* v. *Collins* (1) and *Bos* v. *Helsham* (2), which decide that persons so appointed are valuers, not arbitrators. *In re Hopper* (3) is not inconsistent; there the judges of the Court of Queen's Bench only said that, if those cases bore the construction which counsel had attempted to put on them, they could not agree with them;

(1) 26 Beav. 306. (2) Law Rep. 2 Ex. 72.
(3) Law Rep. 2 Q. B. 367.

they did not say that they thought the cases had been wrongly decided. Blackburn, J., said (1): "The cases of *Collins* v. *Collins* (2) and *Bos* v. *Helsham* (3) go to this extent, that, where compensation is to be settled by a particular person, that is not necessarily an award. In that I quite agree. An appraisement is not necessarily an award. If those cases are to be supposed to go as far as to decide that an agreement to assess compensation and ascertain value could not be a matter of arbitration, and there is to be no award, I should certainly pause before I concurred in them." *In re Hopper* (4), therefore, in no way takes away from the authority of *Collins* v. *Collins* (2) and *Bos* v. *Helsham.* (3) In the present case, I come to the conclusion, on the construction of the agreement, that the two persons who are indicated are to be mere valuers, not arbitrators. A material provision contained in the agreement in *In re Hopper* (4) is wanting in the present case; there was there a distinct provision in the agreement that, if the two valuers appointed by the landlord and tenant should disagree in their valuation, the amount of compensation to be paid to the tenant should be referred to the umpirage of such person as the valuers should in writing appoint. The parties had agreed that, in case of difference, an umpire should be appointed to determine as arbitrator, and he was an arbitrator, if the valuers were not. We have no right to insert such a provision in the present agreement, unless it is a matter of necessary implication; it is not enough to say that there is a reasonable inference that the parties intended it. There is no such necessary implication, and therefore there is no agreement in writing to submit the matter in dispute between the parties to arbitration. The appointment of an umpire is not of itself a submission to arbitration; it is only a consequence of such a submission. The case does not come within s. 17, and there is no power to make the agreement a rule of court. The decision of the Divisional Court was right.

BAGGALLAY, L.J. I so entirely concur in the decision of the Master of the Rolls and the reasons which he has given for it,

(1) Law Rep. 2 Q. B. 376.
(2) 26 Beav. 306.
(3) Law Rep. 2 Ex. 72.
(4) Law Rep. 2 Q. B. 367.

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that I will only add that, while fully recognising the authority of the cases which have been cited, I have come to the conclusion that the agreement in the present case was to appoint valuers, not arbitrators.

Appeal dismissed.

Solicitors for tenant: *Storey & Cowland, for Sadd & Co., Norwich.*

Solicitors for landlord: *Green & Hartcup.*

W. L. C.

May 9.

LAURA COTTON WELCH, BY T. H. G. WELCH, HER NEXT FRIEND *v.* THE BISHOP OF PETERBOROUGH, AND J. B. HOWES, THE REV. W. A. HOWES, AND THE REV. JOHN WHITEHURST.

Quare Impedit—Consolidated Benefice under 3 *&* 4 *Vict. c.* 113, *and* 26 *&* 27 *Vict. c.* 120—*Right of Presentation.*

The vicarage of P. formerly consisted of two medieties, known respectively as the upper vicarage and the lower vicarage, the profits and spiritual charge being divided between two incumbents. There was only one parish church, and the right of patronage and nomination to the upper vicarage was vested in the Lord Chancellor, and that of the lower in the Rev. H. F. Welch. In 1873, Welch presented himself to the lower vicarage. In 1875, he mortgaged the advowson thereof (with a power of sale) to Howes for 800*l.*, and in 1877 made a further charge upon it in favour of Howes of 250*l.*

In 1878, the Lord Chancellor, under 26 & 27 Vict. c. 120, conveyed to Welch the advowson of the upper vicarage, subject to the then-existing incumbency. There was a proviso in the Act restricting the purchaser from selling the advowson or next presentation until after the expiration of five years from the date of the purchase. In May, 1879, the incumbency of the lower vicarage having become vacant, the two vicarages were under 3 & 4 Vict. c. 113 and an Order in Council consolidated, and the two medieties became in respect both of the profits and the spiritual charge one undivided benefice, of which Welch without any form of institution became the incumbent, in whom was vested the advowson or right of patronage and nomination of the whole undivided benefice. On the 1st of August, 1879, Welch mortgaged the advowson of the consolidated benefice to Howes, to secure the previous and further advances, with the usual power of sale.

In March, 1882, Howes died, leaving a widow, and having by his will devised and bequeathed his residuary real and personal estate to trustees, in trust for his wife for life, &c. In March, 1883, the executors of Howes contracted to sell the advowson of the undivided benefice to his widow, and she, in April, 1883, contracted to sell the same to one Ellison. In June, 1883, Welch died insolvent (the debt to Howes still remaining unpaid), having by his will devised and

bequeathed all his real and personal estate to trustees in trust for his widow (the now plaintiff) for life, &c.

The plaintiff and the executors of Howes each claimed the right to present to the undivided vicarage:—

Held,—upon the authority of *Hawkins* v. *Chappel* (1 Atk. 621) and *Briggs* v. *Sharp* (Law Rep. 20 Eq. 317),—that the right to nominate was in the plaintiff, she being under her husband's will beneficial owner for life of his estate real and personal, and there being no indication of an intention that during her life the right to nominate should be exercised by any other person.

QUARE IMPEDIT by the plaintiff, the widow of the Rev. Henry Foster Welch, who claimed a declaration that she was entitled to nominate a clerk to the living of Pattishall, in the county of Northampton, and that the Bishop of Peterborough might be restrained from instituting any clerk other than the one nominated by herself.

The cause came on for trial before Mathew, J., at the last assizes at Birmingham, and was adjourned to this Court for further consideration. It was argued on the 1st of April last by *Jelf*, *Q.C.*, and *Redman*, for the plaintiff, and *Graham*, *Q.C.*, and *A. K. Lloyd*, for the defendants other than the bishop. The Bishop of Peterborough appeared by *Ram*, but only for the purpose of submitting to the decision of the Court.

The facts and the arguments are sufficiently detailed in the judgment, which was on the 9th of May, 1885, delivered by

MATHEW, J. The question raised in this action was, whether the plaintiff or the defendants other than the bishop had the right to present to the vicarage of Pattishall, in the diocese of Peterborough. The following are the facts as admitted by counsel at the trial at the last Birmingham assizes:—

The plaintiff, Laura Cotton Welch, is the widow of the Rev. Henry Foster Welch; and the defendants (other than the Bishop of Peterborough) are the executors of the late Richard Howes.

The vicarage of Pattishall formerly consisted of two medieties, known respectively as the Upper Vicarage and the Lower or Nether Vicarage; and the profits and spiritual charge were divided between two incumbents, with only one parish church. The gross annual value of the combined medieties was 456*l.* 17*s.*; the first mediety or upper vicarage was of the annual value of 122*l.* 7*s.*,

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and the second mediety or nether vicarage 334*l.* 10*s.*, including the value of the houses. The advowson or right of patronage and nomination to the upper vicarage was vested in the Lord Chancellor, and that to the lower or nether vicarage in the Rev. Henry Foster Welch.

In 1873, the Rev. Henry Foster Welch presented himself to the nether vicarage, and was instituted. On the 13th of November, 1875, the Rev. Henry Foster Welch mortgaged the advowson of the nether vicarage to Richard Howes, to secure 800*l.* and interest. On the 27th of October, 1877, Henry Foster Welch further charged the advowson of the nether vicarage to secure a further advance of 250*l.*

On the 12th of August, 1878, the Lord Chancellor, under the powers of the statute 26 & 27 Vict. c. 120, in consideration of 1000*l.* conveyed the advowson of the upper vicarage to Henry Foster Welch, subject to the then-existing incumbency. It is provided by s. 21 of that Act that it shall not be lawful for the purchaser to sell or contract for the sale of the advowson or next presentation until after the expiration of five years from the date of the sale to such purchaser.

In February, 1879, the incumbency of the nether vicarage having in the meantime become vacant, the Bishop of Peterborough framed a plan for the consolidation of the two vicarages under the statute 3 & 4 Vict. c. 113, and submitted it to the Ecclesiastical Commissioners. On the 20th of March, 1879, the Ecclesiastical Commissioners prepared a scheme in accordance with the plan. On the 17th of May, 1879, her Majesty in Council ratified the scheme, whereby (1) the two medieties became in respect both of the profits and the spiritual charge one undivided benefice, (2) Henry Foster Welch became without any form or fee of institution incumbent of the undivided benefice, (3) the whole advowson or right of patronage and nomination of the whole undivided benefice was vested in Henry Foster Welch, his heirs and assigns, for ever. On the 23rd of May, 1879, the order in Council ratifying the scheme was published in the *London Gazette*.

On the 1st of August, 1879, Henry Foster Welch mortgaged the advowson of the consolidated benefice to Richard Howes, to secure the previous and further advances, amounting together to 1613*l.* 0*s.* 9*d.*

On the 26th of March, 1882, Richard Howes died, leaving a widow, Sarah Ann Howes, and having by his last will appointed the defendants (other than the bishop) his executors, and, subject to certain specific devises and bequests, devised and bequeathed his residuary real and personal estate to his executors upon trust for sale, conversion, and investment, and to stand possessed of the income thereof upon trust for his wife Sarah Ann Howes during her natural life.

Each of the above-mentioned mortgages contained the usual power of sale.

On the 6th of March, 1883, the executors, having failed to sell the advowson of the undivided benefice by auction, entered into a contract in writing to sell the advowson to Sarah Ann Howes for 900*l.*, and Sarah Ann Howes then paid a deposit of 90*l.* to the defendants other than the bishop.

On the 5th of April, 1883, Sarah Ann Howes entered into a contract in writing to sell the said advowson to the Rev. John Ellison, of Sowerby Bridge, Normanton, for 1000*l.*, and Ellison then paid to her a deposit of 100*l.*

These contracts are still subsisting; but neither of them has been completed.

The defendants the executors of Richard Howes received the proceeds of a policy on the life of Henry Foster Welch, and also a further sum of 396*l.* 1*s.* 1*d.* settled for Laura Cotton Welch for life, remainder to her children by her present husband, and, in default, to the defendants the executors of Richard Howes.

On the 25th of June, 1883, Henry Foster Welch died insolvent, and being indebted to these defendants in the sum of about 2300*l.*, the greater portion of which, estimated at about 1800*l.*, is still unpaid, leaving a widow, the present plaintiff, and T. H. G. Welch, his eldest son, and having by his last will given all his real and personal estate and effects of whatever nature and wheresoever situate to trustees, in trust to receive the income arising from such estate and pay the same over to his wife, the plaintiff, for her life, free from the debts or control of any husband, and after the death of his wife for conversion into money, and to be distributed to children equally.

In December, 1883, the defendants, at the request and on the

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nomination of Sarah Ann Howes, presented the Rev. John Simpson to the bishop, and requested him to institute and cause him to be inducted to the vicarage. Sarah Ann Howes so nominated the Rev. John Simpson at the request of John Ellison.

In December, 1883, the plaintiff, Laura Cotton Welch, presented to the defendant, the Bishop of Peterborough, the Rev. George Wintour to be instituted and inducted to the living of Pattishall. The executors had no knowledge of this presentation until the 28th of December, 1883, when it was communicated to them by a letter from the bishop's secretary of the 27th of December, 1883.

On the 12th of March, 1884, the plaintiff nominated, and requested the defendants, the executors, to present to the bishop the Rev. George Wintour and to request the bishop to institute and cause him to be inducted to the vicarage; which they refused to do. This nomination is dated the 12th of March, 1884, but was received by the defendants on the 18th.

Prior to the 18th of March, 1884, the plaintiff had not nominated or requested the defendants, the executors of the late Richard Howes, to present any person to the living, having herself nominated to the bishop the Rev. George Wintour in December, 1883.

The bishop has not inducted or caused to be inducted either of the said clerks, or any other, to the vicarage; and has by his counsel submitted the question of the right to nominate to the judgment of the Court.

Copies of all the deeds and other documents referred to were admitted, and were to be taken as evidence common to both parties: also particulars of sale of advowson by the mortgagees; letter of the solicitors of the defendants, Richard Howes' executors, of the 27th of August, 1883, to the plaintiff's solicitors, in which they state that they have requested the plaintiff T. H. G. Welch, and he had agreed, as heir-at-law, to concur in the presentation to the living; and letter of the Rev. John Ellison to the plaintiff, Laura Cotton Welch, of the 1st of April, 1884, and other correspondence and documents already admitted by the solicitors on both sides.

The plaintiff, in support of her right to the nomination, relied

upon the will of her husband, Henry Foster Welch, by which he devised and bequeathed all his real and personal estate and effects of whatever nature and wheresoever situate to trustees, their heirs, &c., in trust to receive the income arising from such estates and pay the same to his wife, the plaintiff, for and during her life. It was contended for the plaintiff that she would clearly have been entitled to nominate as against mortgagees, and that her position was not altered by the attempted exercise by the defendants the executors of the mortgagee of the power of sale contained in the mortgage to their testator, which was of no effect by reason of the prohibition contained in s. 21 of 26 & 27 Vict. c. 120.

For the executors, it was contended that the plaintiff had acquired no right to nominate under the will of her husband, which, it was said, did not operate upon the advowson, and that, as the heir-at-law had never been asked to present, the executors of the mortgagee were entitled to present, to prevent the nomination from lapsing to the bishop. But upon the authority of *Hawkins* v. *Chappel* (1), followed in *Briggs* v. *Sharp* (2), I am of opinion that under her husband's will the right to nominate was in the plaintiff. She was beneficial owner for life of her husband's estate real and personal; and there was no indication of an intention that during her life-time the right to nominate should be exercised by any other person.

It was then said, for the executors, that the plaintiff was asking for the assistance of the Court as a Court of Equity, and that such aid ought not to be granted, except upon the terms of payment of what was due on the mortgage. But the answer seems to be that the plaintiff is not asking for the assistance of the Court as a Court of equity; and the case of *Dyer* v. *Craven* (3) relied upon by the defendants' counsel seems in no way applicable to this case. The plaintiff's contention is that she has the sole right to nominate, and that the executors have no right to prevent her doing so.

It was next argued, for the defendants, that, although five years had not elapsed when the contract of sale was entered into, the defendants after the expiration of five years had been called

(1) 1 Atk. 621. (2) Law Rep. 20 Eq. 317.
(3) 1 Dickens, 662.

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on by the purchaser to present him, and had done so; and this, it was said, was an affirmance of the contract, and was equivalent to a new contract at that date. But this supposed affirmance took place after the living had become vacant, and at a time when no contract for the sale of the next presentation would have been valid.

The defendants next insisted that a good title to the consolidated benefice was derived from the scheme approved by Order in Council; and, inasmuch as it was no part of the scheme that a sale should be prohibited, it was contended that the Act 26 & 27 Vict. did not invalidate the agreement to sell. It was said that the Order in Council was equivalent to a private Act enabling the mortgagor to sell, and therefore averting the operation of the 26 & 27 Vict. c. 120. But it seems to me that, if such was the intention of the Order in Council, it would be clearly ultrà vires. There is nothing in the statute 3 & 4 Vict. c. 113 to shew that the Order in Council was intended to have the effect of controlling a subsequent Act of Parliament. But the terms of the Order in Council seem to me to intimate the contrary intention; for, clause 6 of the scheme ratified by the Order in Council continues existing disabilities attaching to either mediety of the benefice. The fact that the two medieties were fused into one living is not incompatible with the existence of the disability. The case seems to me the same in principle as if at the time of the amalgamation each part had been subject to a similar restriction.

My judgment is therefore for the plaintiff, with costs. The costs of the bishop, to be ascertained upon taxation, must also be paid by the defendants.

Judgment accordingly. (1)

Solicitors for plaintiff: *Clarke, Woodcock, & Rylands, for Clarke & Sons, Shrewsbury.*

Solicitors for the bishop: *Clarke, Rawlins, & Co.*

Solicitors for the other defendants: *Bridges & Co., for Howes & Percival, Northampton.*

(1) Upon the application of the counsel for the defendants (other than the bishop), execution was stayed for a fortnight,—to be continued until the hearing of the appeal, if entered within that time.

J. S.

JONES *v.* RICHARDS. 1885 *Aug.* 3.

Interrogatories—Libel—Matters in Issue—Order XXXI., r. 1*—Comparison of Hand-writing.*

In order to prove that the defendant was the writer of a libellous letter, he may be interrogated as to whether or not he was the writer of another letter addressed to a third person,—as leading up to a matter in issue in the cause, and therefore relevant.

ACTION for a libel contained in an anonymous letter alleged to have been written by the defendant, addressed to Earl Lisburne, reflecting upon the character of the plaintiff, who was employed by a builder upon the Earl's estate.

The defence was that the defendant did not write, publish, or send the letter referred to in the statement of claim. Issue thereon.

The following interrogatories (amongst others) were administered to the defendant in the registry of the Aberystwith district,—

"1. Did you, on or about the 16th of February, 1885, or at some other and what date, write and send or cause to be sent to Colonel Pryse, of &c., a letter of which a copy is annexed hereto, marked A., of which the original will, if you require it, be shewn to you before swearing your affidavit in answer to these interrogatories, on your giving reasonable notice in that behalf?

"2. Did you on or about the 26th of January, 1885, or at some other and at what date, write and send or cause to be sent a letter of which a copy is annexed, marked B. [the letter containing the alleged libel], of which the original will, if you require it, be shewn to you before swearing your affidavit in answer to these interrogatories, on your giving reasonable notice in that behalf?"

The answers delivered were as follows:—

"1. I object to answer the interrogatory numbered 1, on the ground that the same is irrelevant for the purposes of this action.

"2. I object to answer the interrogatory numbered 2, on the ground that I am advised and believe that my answer thereto might tend to criminate me."

On the 30th of June, 1885, a judge's order was obtained

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requiring the defendant to further answer the interrogatories. Against this order the defendant appealed.

August 3. *Willis Bund*, in support of the appeal, submitted that the defendant was not bound to answer the first interrogatory, inasmuch it was not relevant to the matters in issue in the cause.

[FRY, L.J. Why not? The plaintiff wishes to prove, by comparison of hand-writing, that the defendant was the author of the letter containing the alleged libel.

LORD COLERIDGE, C.J. If put into the witness-box, the defendant might be asked the question. Why, then, should he not answer the interrogatory?]

By the second proviso of Order XXXI., r. 1, it is declared that "interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness."

[FRY, L.J. This interrogatory does relate to a matter in question in the cause; it leads up to a question which is in issue, viz. whether the defendant wrote the letter which contains the alleged libel.]

English Harrison, contrà, was not called upon.

LORD COLERIDGE, C.J. I think the interrogatory should be answered. The answer could be got from the defendant in the witness-box, in chief. The plaintiff would clearly have a right to put another document in the defendant's hand, and ask him if that was in his hand-writing. If the answer were in the affirmative, it might be cogent evidence that he also wrote the letter in question in the cause; and so it becomes relevant.

FRY, L.J., concurred.

Appeal dismissed.

Solicitor for plaintiff: *Griffith Jones, for G. Jones & Co., Aberystwith.*

Solicitors for defendant: *Trinders & Romer, for Davis Lloyd, Aberystwith.*

J. S.

IN RE JENKINSON. EX PARTE THE NOTTINGHAM AND NOTTINGHAMSHIRE BANK. 1885 *April* 1.

Bankrupt—Reputed Ownership—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), s. 44.

J., who carried on business as a stockbroker, silversmith, and watchmaker, deposited with his bankers the certificates of thirty shares in a joint stock company as security for the balance of his overdrawn account. There was no formal transfer of the shares. The company had notice of the deposit on the 31st of January, 1884. On the 2nd of February a petition in bankruptcy was filed against J., and a receiving order made, and he was subsequently adjudged bankrupt:—

Held, that the shares were not at the commencement of the bankruptcy "in the possession, order, or disposition of the bankrupt *in his trade or business*," within s. 44 of the Bankruptcy Act, 1883.

APPEAL from an order of the judge of the county court at Lincoln, directing the certificates of certain shares to be delivered up to the trustee on the ground that they were at the time of the act of bankruptcy "in the possession, order, or disposition of the bankrupt in his trade or business," within the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44.

It appeared that Jenkinson, the bankrupt, who carried on business at Nottingham as a stockbroker, silversmith, and watchmaker, was in 1878 possessed of thirty B. shares in a limited company called the Lincoln Wagon Co. Of seventeen of these shares he was the original allottee; the other thirteen he had bought in the market. In 1878 he deposited these shares with the Nottingham and Nottinghamshire Bank to secure his overdrawn account with them; but they were never formally transferred to the bank. On the 30th of January, 1884, notice of the deposit was given by the bank to the Lincoln Wagon Company; and on the 2nd of February a receiving order was made, under which Jenkinson was afterwards adjudged a bankrupt. On a subsequent day, the judge of the county court at Lincoln made the order appealed from, that the certificates of these thirty shares should be delivered up to the trustee of Jenkinson, on the ground that the shares were, at the time of the act of bankruptcy upon which the adjudication was founded, viz. on the 27th of January, 1884, "in the possession, order, or

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disposition of the bankrupt in his trade or business," within s. 44 of the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52. (1)

March, 1885. *Yate Lee* (*Bigham, Q.C.*, with him), for the appellants. The main question is whether the shares were at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt "in his trade or business," by the consent and permission of the true owner, under such circumstances as that he was the reputed owner thereof. The words "in his trade or business" in that section are substituted for the words "being a trader" in the Act of 1869 (2) and must have been intended to have a more limited or restricted meaning. What else could have been the object of changing the phrase? By depositing the shares (which clearly were choses in action) with his bankers, the bankrupt parted with them: they then ceased to be, if they ever had been, in his possession, order, or disposition in his trade or business: and the transaction is within the protection of s. 49. (3)

(1) "The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, shall comprise the following particulars:

"(i.) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge; and,

"(ii.) The capacity to exercise and take proceedings for exercising all such powers in, over, or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice; and,

"(iii.) All goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner, under such circumstances as that he is the reputed owner thereof: Provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section."

(2) 32 & 33 Vict. c. 71, s. 15.

(3) "Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing shall invalidate, in the case of a bankruptcy,—(*a.*) Any payment by the bankrupt to any of his creditors,—(*b.*) Any payment or delivery to the bankrupt,—(*c.*) Any conveyance or assignment by the bankrupt for valuable consideration,—(*d.*) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration:

"Provided that both the following conditions are complied with, viz. 1. The payment, delivery, conveyance, assignment, contract, dealing, or

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Horton Smith, Q.C., and *Stanger*, contrà. These shares were purchased with money acquired by the bankrupt in his trade or business of a stockbroker. He deposited them with his bankers to secure, not a private debt, but a debt contracted by him by overdrawing his account to enable him to carry on his business: they therefore represented money which was used by him in his trade or business, within the meaning of the Act. It is a well-known practice for stock and share-brokers to become possessed of shares in railways and other public companies, by reason of the failure of their customers or clients to provide them with funds to pay for them on the settling-day, and for the brokers to deposit such shares with their bankers as security for advances. Shares so acquired would clearly be shares in the possession, order, or disposition of the broker in his trade or business. The judgment of Bacon, V.C., in *Colonial Bank* v. *Whinney* (1) is strong to shew that there is no substantial difference between the language of s. 15 of the Act of 1869 and s. 44 of the Act of 1883. It cannot be said that these shares were not in the bankrupt's possession, &c., in his trade or business, when he raised money upon them for the purpose of enabling him to carry on his business. It is admitted that shares in a public company are choses in action: they come within the first part of the clause. Any personal property which a man uses for the purpose of carrying on his trade or business becomes part of his business assets divisible amongst his creditors.

Bigham, Q.C., in reply, referred to Williams on Bankruptcy, 3rd edit. 195, 196.

Cur. adv. vult.

April 1. The judgment of the Court (Cave and Wills, JJ.,) was delivered by

CAVE, J. This is an appeal from an order of the judge of the

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transaction, as the case may be, takes place before the date of the receiving order; and, (2.) The person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed, or entered into, has not at the time of the payment, delivery, conveyance, assignment, contract, dealing, or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time."

(1) 51 L. T. 354.

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county court of Lincoln, whereby it was ordered that the certificates of 30 shares in the Lincoln Wagon Co. in the possession of the appellants should be delivered to the trustee of the bankrupt.

In February and October, 1878, Jenkinson deposited the certificates of these shares with the appellants to secure his overdrawn account. Notwithstanding the deposit, the shares continued to be registered in the name of Jenkinson only. On the 2nd of January, 1884, a receiving order was made against Jenkinson, and he was afterwards adjudicated bankrupt. He had up to the time of his bankruptcy carried on business as a stock-broker, silversmith, and watchmaker; and the order appealed from was made on the ground that the certificates were in the order and disposition of the bankrupt in his trade or business.

The reputed ownership clause (s. 15) of the Bankruptcy Act of 1869 embraced all goods in the possession, order, or disposition of the bankrupt, *being a trader*. The clause of the present Act (46 & 47 Vict. c. 52), s. 44, is confined to all goods in the possession, order, or disposition of the bankrupt *in his trade or business*.

It was contended for the respondents, that the language of these enactments is substantially the same; and in support of that argument the judgment of Bacon, V.C., in *Colonial Bank* v. *Whinney* (1) was referred to. In that case the Vice-Chancellor is made to say that debts due to a man "as a trader" and debts due to him "in the course of his trade or business" are identically the same expressions. But it is hardly possible that he can have been correctly reported; for, in both Acts the words of the proviso are the same, and the expression debts due to a man "as a trader" are not to be found in either section. The expressions goods "in the possession of a bankrupt being a trader" and goods "in the possession of a bankrupt in his trade or business" can hardly be regarded as identical. If a wine-merchant carrying on business in the City, lives, say at Surbiton, the furniture in his house at Surbiton may be said to be in his possession being a trader, but it cannot be said, we think, that it is in his possession in his trade or business. So, if a silk-mercer in St. Paul's Churchyard were to keep a yacht for his amusement, it could hardly be said that it was in his possession in his trade as a silk-mercer.

(1) 51 L. T. (N.S.) 354.

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We prefer to follow the language of Bacon, V.C., in *In re Pryce*. (1) In that case the bankrupt, a merchant in Liverpool, had deposited with his stock-broker a debenture in a mining company as a security for a debt he owed to the broker; and it was argued that, because the bankrupt was a trader, the debenture (which was admitted to be a chose in action) was a debt due to him in the course of his trade. Speaking of that argument, the Vice-Chancellor said: "I am unable to follow it. The result of it would be that every investment made by a man engaged in trade would be a debt due to him in the course of his trade. The investment has nothing whatever to do with the bankrupt's trade. The transaction was a plain and ordinary one, about which there can be no doubt whatever that it was an investment made by lending the money to the company." If a debenture in a mining company in which a trader has invested his money, being a chose in action, is not a debt due to the trader in the course of his trade or business, it would seem to follow that a share in a wagon company in which a trader has invested his money, being a chose in possession, is not in his possession in his trade or business.

It was further argued that, however this might be if the bankrupt had not mortgaged the shares at all, or had deposited them to secure a private debt, yet that, as he deposited them with his bankers to secure his banking-account, they became from that moment in his order and disposition in his trade or business. It was somewhat difficult to follow the argument, but it was to the following effect,—The bankrupt wanted an advance for the purposes of his business, and he got an advance by depositing these shares with the bankers. The advance was used in his business; and these shares represented the advance; and therefore the shares were used in the business also. When this somewhat confused argument comes to be examined, it falls to pieces directly. The bankrupt had the shares, and parted with them to secure the advance; therefore, so far as he was concerned, the money advanced which he got represented the shares he parted with; and conversely to the bankers, the shares which they got from the bankrupt represented the money they had advanced to him: but why, because the bankrupt got the money on the

(1) 4 Ch. D. 685.

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security of his shares to use in his business, therefore the shares, which he parted with to get the money which he wanted to use in his business, were themselves in his order and disposition in his business, passes comprehension. Let us take again the case of the silk-mercer who has a yacht for purposes of pleasure, if he mortgages the yacht to secure his banking-account, but continues to sail about in it for his pleasure, does the yacht cease to be in his possession for purposes of pleasure, and begin to be in his possession in his trade? So long as it is in his possession unmortgaged, no reputation of ownership arises: nor does any such reputation arise if he mortgages the yacht to secure a debt which is not a trade debt. But it is said that the moment he mortgages it to secure his trade account with his bankers this reputation of ownership arises, and arises, be it remembered, among people who are utterly ignorant of the mortgage; for, if they knew of the mortgage which is said to give rise to the reputation of ownership, it is clear that that reputation could never arise. If this argument is good for anything, the decision in *In re Pryce* (1) should have been the contrary way.

Lastly, it was said that there is a well-known custom on the London Stock Exchange by which London brokers are compelled themselves to take up stock they have bought for their customers if the customer fails to find the money on the appointed day, and that in that case it is a very common thing for the broker to deposit the shares so taken up with bankers to secure an advance, and to redeem them again when the customer finds the money. Whatever may be the law as to shares so acquired and dealt with, the facts of this case are entirely inconsistent with the argument. It has first to be made out as a fact that the shares were in the bankrupt's possession in his trade or business, before the question of reputed ownership arises. In this case, the shares had in fact been registered in the bankrupt's name for six years, and were held by him simply as an investment, and not for the purpose of selling to his customers. The further question, therefore, whether the shares were in the bankrupt's reputed ownership does not arise; for, the necessary preliminary fact that they were in his possession in his trade or business does not exist.

(1) 4 Ch. D. 685.

In our judgment, the order appealed from was wrong; and the appeal must be allowed and the order set aside, with costs here and below. The trustee may recoup himself out of the estate.

Appeal allowed.

Solicitor for appellants: *R. F. Watson.*

Solicitors for trustee: *Richard Smith & Wilmer.*

J. S.

IN RE RIDGWAY. EX PARTE RIDGWAY.

Aug. 11.

Bankruptcy—Gift of Chattels—Bankruptcy of Donor—Costs.

In 1866 A., soon after the birth of his son T., purchased a pipe of wine for his son, and had it bottled and laid down in his cellar, and from that time it remained intact in the cellar and was known in the family and amongst their friends as T.'s wine. In 1885 A. became bankrupt:—

Held, that there was not sufficient evidence of an intention to make an immediate present gift of the wine to T., and that it passed to the trustee in bankruptcy.

THIS was a motion on behalf of Thomas Archer Ridgway, an infant, by his next friend, for an order to restrain the trustee in bankruptcy of Colonel Ridgway from selling certain port wine of the vintage of 1863 in certain bins in the cellar of Sheplegh Court, the private residence of Colonel Ridgway; and that the trustee might be ordered to deliver up the wine to the applicant.

There was a similar motion by Alice Ridgway in respect of some port wine of the vintage of 1858.

The two motions came on together, and the claims were made under these circumstances:

Thomas Archer Ridgway and Alice Ridgway were two of the children of Colonel Ridgway, an army agent. Thomas Archer Ridgway was born in November, 1864, and when he was about eighteen months old his father purchased for him a pipe of port wine of the vintage of 1863, and had it bottled and laid down in the cellar of Sheplegh Court, and from that time the wine was always known and spoken of in the family and amongst their friends as "Tom's port." About the same time Colonel Ridgway gave to his daughter Alice some dozens of port wine of the vintage

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of 1858, which at that time was in the same cellar, and this wine in like manner acquired the reputation of being "Alice's port." Both wines remained intact in the cellar, a bottle only occasionally being opened, until the bankruptcy of Colonel Ridgway, which occurred in the spring of 1885. Tom and Alice then claimed these wines as their own property, but the trustee in bankruptcy took possession of them as part of the estate of the bankrupt, and advertised a sale: hence the motions.

Aug. 4. *S. Woolf*, for the motions. There was a complete gift by the father and an assent by the donees. Under the circumstances no symbolical delivery of the chattels could be given, and it is clear that the gift was made at a time when bankruptcy could not have been contemplated by the donor.

H. Reed, for the trustee in bankruptcy. The gift was incomplete. There was no constructive delivery of possession, no declaration of trust, and no placing of the goods in the dominion of the children. The property in the wine, therefore, did not pass to them: *Shower* v. *Pilck* (1); *Irons* v. *Smallpiece*. (2) The American law is the same: Kent's Commentaries, § 438, and cases there cited.

S. Woolf, in reply. *Shower* v. *Pilck* (1) and *Irons* v. *Smallpiece* (2) have been disapproved of as going too far: *Ward* v. *Audland*. (3) The later cases shew that actual delivery is not essential to complete the gift. It is sufficient to shew that the ownership has been changed: *Winter* v. *Winter* (4); *London, Brighton and South Coast Ry. Co.* v. *Fairclough* (5); *In re Harcourt*. (6)

H. Reed, on the cases cited in reply. In Williams on Personal Property, 11th ed. p. 41, and in all the text-books, the rule is based on *Shower* v. *Pilck* (1) and *Irons* v. *Smallpiece*. (2) There must be delivery: *Bourne* v. *Fosbrooke*. (7)

Cur. adv. vult.

Aug. 11. CAVE, J. This is a motion to restrain the trustee in bankruptcy from selling certain port wine. It is a motion on

(1) 4 Ex. 478.
(2) 2 B. & A. 551.
(3) 16 M. & W. 871.
(4) 4 L. T. (N.S.). 639
(5) 2 M. & G. 691, n.
(6) 31 W. R. 578.
(7) 18 C. B. (N.S.) 515.

behalf of Alice Ridgway, a daughter of the bankrupt; and there is a similar motion on behalf of the son, Thomas Archer Ridgway. The wine is claimed by them as a gift from their father. Now it is necessary, in order to establish a gift of this kind, to shew circumstances from which an intention of making an immediate present gift may reasonably be inferred. Circumstances from which an intention of making a future gift may reasonably be inferred will not be sufficient. It must be an immediate present gift. It is contended for the trustee that change of possession from the donor to the donee must be shewn, and that no property passes so long as the subject of the gift remains in the possession of the donor: *Irons* v. *Smallpiece* (1) and *Shower* v. *Pilck.* (2) On the other hand, it is said that the principle laid down in those two cases goes too far, and has been disapproved of by Parke, B., in *Ward* v. *Audland* (3), by Crompton, J., in *Winter* v. *Winter* (4), and by Pollock, B., in *In re Harcourt.* (5) I am of opinion that it is going too far to say that retention of possession by the donor is conclusive proof that there is no immediate present gift; although, undoubtedly, unless explained or its effect destroyed by other circumstances, it is strong evidence against the existence of such an intention. The applicants must, however, prove circumstances from which it can fairly be inferred that the donor intended to make an immediate gift, so that the thing given then ceased to be the donor's and became the property of the donee. It is not enough to prove circumstances from which the proper inference is that the donor intended to make a gift in the future, but so that, until something further was done to complete the gift, he should retain the control over the thing intended to be given.

I may at once dispose of most of the affidavits in this case. The reputation in the family and among the friends that it was Tom's or Alice's wine proves very little. Such a reputation would arise from the expression of his intention by the donor, whether it was an intention to give at once or at some future time. As to Tom's wine, eighteen or twenty years ago, soon after

(1) 2 B. & A. 551.
(2) 4 Ex. 478.
(3) 16 M. & W. 871.
(4) 4 L. T. (N.S.) 639.
(5) 31 W. R. 578.

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Tom's birth, Colonel Ridgway determined to lay down a pipe of port, and told the family and his friends it was for Tom. It was, however, placed in Colonel Ridgway's cellar and remained in his possession, and occasionally a bottle of it was tried to test its condition. The bulk has not been drunk, and is not yet ready to drink. It is suggested that the wine became Tom's when it was first laid down, and, indeed, it is clear that unless there was a gift then nothing has been done since to amount to one. I think, however, that the circumstances point to an intention to give in the future rather than to a present gift. The wine was useless to the child whilst he remained such, and he must at the time have been quite unconscious of any gift and quite incapable of exercising any acts of ownership. Was it intended that when the boy got to be sixteen or seventeen he should be free to drink it at his pleasure, or to exchange it for a gun, for instance, or a horse? I cannot think that anything of the kind was intended. In my opinion Colonel Ridgway had formed the intention of giving it to his son at some future time without fixing in his own mind when that time should arrive, and had determined in the meanwhile to retain the control over it, and the power of dealing with it as circumstances might require.

Then as to Alice's wine. Having expressed his intention of giving Tom a pipe of port Colonel Ridgway seems to have thought it only fair to his eldest daughter that she also should have some wine, and he expressed his intention of giving her certain wine in his cellar which was then in particular bins. His original intention was, as he says, to give the wine to his daughters Alice and Jane jointly, but he only expressed the intention of giving the wine to Alice, and so, contrary to his real intention, the wine acquired among his family and friends the reputation of being Alice's, and not Alice's and Jane's. Beyond the expression of intention nothing was done to change the property. The wine remained in Colonel Ridgway's cellar and under his control, and, though it was once moved, yet that was not done with any reference to the gift but simply for the more convenient arranging of the wine in Colonel Ridgway's cellar. The wine is still immature, and only a small part of it has been consumed by Colonel Ridgway and his friends, for the young lady does not drink port.

Here, again, if there was any present immediate gift, it was made when Colonel Ridgway expressed the intention of giving it, and when Alice was a child, for nothing has been done since in any way to carry out the intention or to complete the gift, if it was then imperfect. I feel myself compelled to come to the same conclusion in this case as in the case of Tom's pipe, and for the same reasons. If Alice had married I think Colonel Ridgway would have completed the gift by sending the wine to her; but I think that both his and her understanding of the so-called gift was, that she was not, without some further consent on his part, to be at liberty to sell it or give it away, but that so long as she remained a member of his household the wine as it matured was to be consumed by the family in the ordinary way.

In my judgment there never was in either case any intention on the part of Colonel Ridgway of making a present immediate gift, and both applications must be refused.

Applications refused.

Solicitors for applicants: *Parker, Garrett, & Parker.*
Solicitors for trustee: *Anderson & Son.*

H. L. F.

THE QUEEN *v.* THE JUSTICES OF DENBIGHSHIRE.

June 17.

*Poor-rate—Appeal—Assessment Committee—Failure to obtain Relief on Objection to Valuation List—Appeal against second Rate—*27 *&* 28 *Vict. c.* 39, *s.* 1.

A person who has once given to the assessment committee notice of objection against a valuation list and failed to obtain such relief as he deems just, may appeal to quarter sessions against any subsequent poor-rate made in conformity with the list, and 27 & 28 Vict. c. 39, s. 1, does not make it a condition precedent of such appeal that previously thereto he should repeat his application to the committee for relief.

RULE calling upon justices of Denbighshire to shew cause why a writ of mandamus should not issue to them, commanding them to enter continuances and hear and determine an appeal of Robert Bamford Hesketh against a rate or assessment made for the relief of the poor of the parish of Abergele on or about the 4th of November, 1884.

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From the affidavits on which the rule was granted it appeared that Hesketh, the owner of a farm in the valuation list for the parish of Abergele, in July, 1884, gave notice of objection to the assessment committee and appealed to them against the valuation list on the ground that he was overrated, and rated upon an excessive acreage in respect of the farm. The appeal was heard on the 4th of September, and on the 6th of September he received notice that the assessment committee had reduced the gross estimated rental from 404*l.* 15*s.* to 381*l.* 15*s.*, and the rateable value from 385*l.* 5*s.* to 363*l.* The valuation list was amended in accordance with the decision but no supplemental list was made or deposited.

The first rate based on the amended list was made on the 4th of November, 1884, and published on the 9th of November, and payment thereof was immediately after demanded of the appellant, who gave notice of appeal against the said rate to the next general quarter sessions to be holden on the 8th of January, 1885, upon the grounds that he was overrated, and that the rate had not been duly published.

At the hearing of the appeal the respondents contended that the court of quarter sessions had no jurisdiction to hear and determine the appeal, on the ground that the provisions of 27 & 28 Vict. c. 39, s. 1, had not been complied with, inasmuch as a second notice of objection to the said list had not been given subsequent to the making of the rate appealed against, and they relied on *Reg.* v. *Great Western Ry. Co.* (1), and *Reg.* v. *Wiltshire* (2), and *Reg.* v. *Derbyshire.* (3)

The court of quarter sessions decided that they had no jurisdiction to hear the appeal, because the valuation list was amended on an objection before the assessment committee, and this appeal was from a rate made on the 4th of November, 1884, and that the appellant should have gone to the assessment committee again after the rate was made, before appealing to the quarter sessions.

An affidavit filed on behalf of the respondents stated that on the 12th of January, 1882, the assessment committee approved a valuation list in which, on the 18th of April, the appellant was

(1) Law Rep. 4 Q. B. 323. (2) 4 Q. B. D. 326.
(3) 25 L. T. (N.S.) 43.

assessed, and a rate was made on the 18th of April, 1884, in which he was assessed in conformity with that list; that on the 4th of August he gave the notice of objection to the assessment committee, which was heard on the 4th of September; that quarter sessions were held on the 16th of October, 1884, and there was ample time after the hearing of the objection to have appealed to the sessions against the rate of the 18th of April, 1884, and which was the then current rate, but no proceedings by way of appeal against such rate were taken by the appellant.

McIntyre, Q.C., and *F. Marshall*, shewed cause. It is a condition of the right of appeal to sessions against a rate made in conformity with the valuation list that the appellant should have given to the assessment committee notice of objection against the list and have failed to obtain such relief as he deems just: 27 & 28 Vict. c. 39, s. 1. The appellant has not fulfilled that condition, and his appeal does not lie. *Reg.* v. *Great Western Ry. Co.* (1) is in point: there the appellant being assessed to a rate went to the assessment committee and failed to get relief, on appeal a case was stated, meanwhile a second rate was made, against which he appealed to sessions without having again applied to the assessment committee, and the Court of Queen's Bench held the appeal could not be heard.

Clement Higgins (*Arthur Charles, Q.C.*, with him), in support of the rule. One application to the assessment committee and failure to obtain such relief as the applicant deems just is sufficient to satisfy the requirements of the statute. It would be a waste of time and expense to go again to the committee who have decided against him. *Reg.* v. *Great Western Ry. Co.* (1) has been doubted and overruled in *Reg.* v. *Wiltshire* (2) and *Reg.* v. *Derbyshire* (3).

LORD COLERIDGE, C.J. This is a case in which we are obliged to form our judgment in the face of two decisions apparently, but perhaps not really, conflicting. I understand the facts to be these: There was an April rate on an April valuation. The

(1) Law Rep. 4 Q. B. 323. (2) 4 Q. B. D. 326.
(3) 25 L. T. (N.S.) 43.

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valuation might have been appealed against, if a reduction was not made by the assessment committee, to the June sessions. But no objections were made before the assessment committee, and no appeal was made to the June sessions. The time for making the next rate approached, and the plaintiff made an appeal against the list, and the assessment committee heard it and gave him some reduction, but not such as he thought he ought to have. Then a rate was made in November, and the appellant appealed to the next practicable sessions against the November rate, to the January sessions, without going a second time to the assessment committee. The assessment committee had not made any supplementary list. The sessions thought they had no jurisdiction to hear the appeal because the appellant had not, before giving notice of appeal to the January sessions, gone through the form of a second appeal to the assessment committee. The question is, had he, under these circumstances, a right to appeal to quarter sessions. That turns on the construction of s. 1 of 27 & 28 Vict. c. 39, which enacts that no person shall be empowered to appeal to any sessions against a poor-rate made in conformity with the valuation list approved by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just. It appears that against the valuation list current at the time of making the November rate, he *had* given notice of appeal to the assessment committee and had *not* obtained such relief as he deemed just. I pause to observe that the Act seems to give him power of applying to quarter sessions—not when he has received *no* relief, but—if he has not received what he considers the just measure of relief. That is this case. If deciding it for the first time, I should have said that, as the Act has not directed that it shall be done every time, it would be enough to do it once for all. If he has once gone to the assessment committee, I am clearly of opinion that the conditions precedent of the Act have been complied with, and that the quarter sessions should have heard the appeal. But it is said the matter should not stand there for there are three cases. First, *Reg.* v. *Great Western Ry. Co.* (1), where the

(1) Law Rep. 4 Q. B. 323.

appellants having been assessed to a poor-rate in conformity with a valuation list, gave notice of objection to the list, but the committee refused to alter the list, and on appeal the rate was confirmed subject to a case; while the case was pending, a second rate was made in conformity with the unaltered list, and the appellants having given twenty-one days' notice of appeal against this rate to the committee, applied to the quarter sessions to enter the appeal against the second rate without having given a fresh notice to the committee of objection to the list, and this Court held that a fresh notice of objection to the list was a condition precedent to the right to enter the appeal against the second rate. No doubt that is a case on which—although it differs somewhat in the facts from the present case—Mr. McIntyre was well warranted in relying as very much in his favour, and so it is, both at first sight and even on examination. But that decision has come under the consideration of two Courts subsequently, of one in June, 1871, and of the other in May, 1879, before the late Lord Chief Justice and Lopes, J. In both those cases *Reg.* v. *Great Western Ry. Co.* (1) was apparently brought to the attention of the Court, and the Court in both cases considered and dealt with that case, and, as it appears to me—I do not like to say overruled it, but—intimated very grave doubt whether it was right. Then should we follow a reasoned judgment, or, as reported, simply a decision without reasons? The reasoned judgments by Hannen, J., in *Reg.* v. *Derbyshire* (2), and the Lord Chief Justice in *Reg.* v. *Wiltshire* (3), shew that the earlier case was rightly doubted in the later case, because the consequence of holding *Reg.* v. *Great Western Ry. Co.* to have been rightly decided are unavoidable, as Mathew, J., has pointed out. It would reduce the Act to an "absurd result," as the Lord Chief Justice said. The legislature would have given power to the parish officers to wear out the patience of the appellant by driving him to perpetual applications, because all that need be done, if the view first taken were right, would be to amend the list by reducing the amount by some small sum, and every time of appeal there must be a fresh notice and a fresh hearing, and

(1) Law Rep. 4 Q. B. 323. (2) 25 L. T. (N.S.) 43.
(3) 4 Q. B. D. 326.

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instead of the Act having given a cheap and speedy procedure it would have caused expense and delay. I think the two later cases rightly pointed out the construction we are now putting on the enactment as the true one. It is enough if the rate is made in conformity with the list which exists, and the appellant, prior to appealing against the rate, has applied to the assessment committee and not got the relief he deems just. These conditions precedent have been fulfilled in this case, and are the conditions precedent which in the later cases were held to be the only conditions precedent.

MATHEW, J. I am entirely of the same opinion. The object of the Act was to enable the party to go and ask relief from the assessment committee instead of appealing to the quarter sessions in the first instance. The legislature expected that the assessment committee would do its duty and ascertain to the best of its ability whether an alteration in the assessment should be made. But parliament contemplated that the assessment committee might go wrong, and therefore allowed an appeal to sessions. We are asked to say that parliament contemplated the necessity of a person going again before the assessment committee for the purposes of hearing again the decision given against him. This would be the idlest form imaginable. I hesitate and decline to impute any such intention to the legislature.

Rule absolute.

Solicitors for appellant: *Field, Roscoe, & Co.*
Solicitors for respondents: *Kennedy, Hughes, & Kennedy.*

J. R.

THE LONDON AND YORKSHIRE BANK *v.* BELTON; ROSS AND SMITH, CLAIMANTS.

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June 19.

*Landlord and Tenant—Agistment of Cattle for "fair price"—Payment in kind—Protection from Distress—*46 & 47 *Vict. c.* 61, *s.* 45.

Live stock agisted for a fair equivalent is within 46 & 47 Vict. c. 61, s. 45 (the Agricultural Holdings Act, 1883), as taken in to be fed at a "fair price," and may, therefore, be exempt from distress, even although such equivalent be not money.

Cows were agisted on the terms "milk for meat," i.e., that the agister should take their milk in exchange for their pasturage:—

Held, that the agistment was within the Act.

INTERPLEADER.

The question was as to the right to the proceeds of the sale of two cows.

In October Smith delivered two cows to Belton, a farmer, for agistment on the terms "milk for meat," i.e., that the cows should feed on the farm, and the farmer should have their milk in return. No money was agreed to be paid or was paid for the agistment. After a threat of execution under a judgment obtained by the Yorkshire Bank against Belton, his landlords, Thomas Ross and William Ross, on the 24th of December seized the cows. They were afterwards taken from the bailiff in possession, and seized and sold under an execution by the Bank.

The interpleader issue was directed and tried in the County Court of Yorkshire holden at Thorne. At the trial it was contended that the cattle were not protected under the Agricultural Holdings Act, 1883, s. 45, as no "price" in money had been paid for the agistment. The judge found that the cattle were the cattle of Smith, that Belton's rent was in arrear, and that there was not stock sufficient on the farm to satisfy the landlords' claim for rent, exclusive of the cattle seized. It was admitted that the landlords had distrained for rent under the Agricultural Holdings Act, 1883, and the county court judge was of opinion on the evidence that Smith had agisted these beasts on the debtor's farm on the terms "milk for meat;" that this was not at all an uncommon arrangement, nor at all open to

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suspicion as made in bad faith and with any bad intention, but one which often was for the convenience of both parties; and that in such an agreement there was an element of price, the farmer who received and agisted the beasts took their milk in place of an actual money payment, and he was to continue to do so; that there was no distinct evidence as to when the agistment contract would terminate, but in accordance with the ordinary meaning of such arrangements it would last till April, or when the spring grass begins to grow; during those winter months the cost to the feeder of the beasts would be more than the profit he would reap, and, on the other hand, at the time when the beasts were sent to him his profit would be much in excess of his expense in feeding the animals.

The county court judge thought, therefore, that at the time the beasts were seized there was in fact nothing due for the agistment, and, as he thought the facts shewed that these beasts had been taken in to be fed at a fair price agreed to be paid for the feeding of such stock by the owner, gave judgment for Smith as against the landlords.

A rule nisi having been obtained calling upon the claimant John Smith to shew cause why the judgment obtained for him in this interpleader issue should not be set aside and judgment entered for the claimants, Thomas Ross and William Ross, or why a new trial should not be had as between the said claimants upon the ground that the learned judge of the county court was wrong in law in holding that the cows were protected from distress by s. 45 of the Agricultural Holdings Act, 1883 (1),

(1) 46 & 47 Vict. c. 61, s. 45: "Where live stock belonging to another person has been taken in by the tenant of a holding to which this Act applies to be fed at a fair price agreed to be paid for such feeding by the owner of such stock to the tenant, such stock shall not be distrained by the landlord for rent where there is other sufficient distress to be found, and if so distrained by reason of other sufficient distress not being found, there shall not be recovered by such distress a sum exceeding the amount of the price so agreed to be paid for the feeding, or if any part of such price has been paid exceeding the amount remaining unpaid, and it shall be lawful for the owner of such stock, at any time before it is sold, to redeem such stock by paying to the distrainer a sum equal to such price as aforesaid, and any payment so made to the distrainer shall be in full discharge as against the tenant of any sum of the like amount which would be otherwise

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J. Tanner, shewed cause. The "fair price" in s. 45 may be "paid" either in money or in kind, e.g., in milk. The word "price" does not necessarily mean money, but "equivalent for a thing bought:" Johnson's Dictionary.

Upon the words "payment in cash," used in s. 25 of the Companies Act, 1867, it has been held that any transaction between a company and a shareholder which in an action for calls would support a plea of payment is "payment in cash" within the terms of s. 25 of the Companies Act, 1867: *Spargo's Case* (1), approved in *White's Case*. (2)

Cyril Dodd, in support of the rule. By s. 60, "except in this Act expressed nothing in this Act shall take away, abridge, or prejudicially affect any power, right, or remedy of a landlord." Sect. 45 uses the words "fair price," "paid," and "amount," all indicating money payment. No doubt "price" in its origin means "reward," but as used in s. 45 it means money. Suppose the compensation for the agistment were the manure of the animals on the land, that surely would not be a "price paid" within the meaning of the section. Even the test of a plea of payment would be in favour of the landlord, for this agreement as to the milk would be accord and satisfaction only, and not payment.

LORD COLERIDGE, C.J. This case has been ingeniously argued, and the construction of the section is not absolutely clear. But I have formed an opinion which, if thought fit, may be reviewed in a superior court. My opinion is, that the decision of the county court judge was right. The simple question is, whether under s. 45 of 46 & 47 Vict. c. 61, a "fair price" to be paid for agistment will include an agreement of barter as well as an agreement for payment in cash. The county court judge has found (and I can quite understand and accept his finding) that agree-

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due from the owner of the stock to the tenant in respect of the price of feeding: Provided always, that so long as any portion of such live stock shall remain on the said holding the right to distrain such portion shall continue to the full extent of the price originally agreed to be paid for the feeding of the whole of such live stock, or if part of such price has been bonâ fide paid to the tenant under the agreement, then to the full extent of the price then remaining unpaid."

(1) Law Rep. 8 Ch. 407.

(2) 12 Ch. D. 511.

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ments of this kind are very common in the part of the country in which he has to administer justice, and it is obvious that if the Act did not apply to them the use and operation of this Act is very considerably narrowed. The conclusion that the Act has failed to that extent is one from which I shrink. The question is, what is the meaning of the words "fair price"? Putting aside pedantic and scholastic refinements and derivations, "price" in ordinary colloquial language does not always mean money, and "fair price" does not always mean "coin of the realm." We say that a man got something and "paid a fair price" for it without meaning that he paid down so many pounds, shillings, and pence, but meaning only that he paid a fair equivalent for what he got.

This Act has said that if the agister has paid a fair price certain consequences shall follow—not that he is to escape a fair payment "in meal or malt," but—that he is not to have his cattle taken from him by the landlord. I think that it was the intention of the legislature to alter the state of things which previously existed, and these agreements must have been known to the legislature. If the legislature has used words which without stretching cover a case of this kind, the inclination of my mind is to put such a construction upon the statute as will give effect to it—not because it is an alleviating statute, but because it is right to give to the words their full meaning. There are expressions in the section, such as the "amount of the price so agreed to be paid" "exceeding the amount remaining unpaid," and "equal to such price as aforesaid," which are, at all events, patient of the interpretation that "price" is to have a wide meaning, and that if a fair price is paid by the owner his cattle are to be protected to the extent of that fair bargain.

MATHEW, J. I am of the same opinion. I cannot gather from the section the slightest hint of an intention in the legislature to confine the provision to cases where contracts of agistment shall be for money and money only; and I hesitate to say that if a small portion of the consideration includes a barter the section should be inapplicable. No doubt the language is unfortunate in some respects, and probably no difficulty would have arisen if

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the language of the sub-section relating to machinery let on hire had been adopted. I think the words "fair price" mean "equivalent." One object of the section is to prevent delusive arrangements for the purpose of defeating distress. I do not come to a conclusion without hesitation, and I think the question worthy of the attention of the Superior Court.

Rule discharged.

Solicitors for Smith: *Finnis & Wylie.*

Solicitors for Ross: *A. F. & R. W. Tweedie.*

J. R.

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Dec. 19.

BOLLEN, APPELLANT; SOUTHALL, RESPONDENT.

Parliament—Notice of Objection—Description of List, where more than One—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s.* 2, *and Sched. Form I.* 1, 2.

A notice of objection given to overseers was as follows: "I hereby give you notice that I object to the name of W. B. being retained in the Blockhouse list of persons, Division 1, entitled to vote at the election of members to serve in parliament for the parliamentary borough of W." There were three lists of parliamentary voters for the Blockhouse, viz. 1,—householders and occupiers. 2. freemen,—3. lodgers. The first of these only had divisions. The name of W. B. was on the parliamentary list 1, Division 1, for the Blockhouse:—

Quære, whether this notice was a sufficient compliance with Form I. No. 1, in the schedule to the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26)?

Held, that, if not, the inaccurate description of the list was a "mistake" which the revising barrister had power to correct, under s. 28, sub-s. 2, of the Act.

APPEAL against a decision of the revising barrister for the city of Worcester.

William Thomas Harris, of 24, George Street, in the city of Worcester, on the list of parliamentary voters, Division 1, for the parish of St. Martin, objected to the names of Walter Bollen and others being retained on the Blockhouse list of persons (Division 1) entitled to vote at the election of members to serve in parliament. The notice of objection given by Harris to the overseers was as follows:—

"To the overseers of the parish [township] of the Blockhouse.

"I hereby give you notice that I object to the names of each and every person mentioned and described below being retained

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in the Blockhouse list of persons, Division 1, entitled to vote at the election of a member [or members] to serve in parliament for the parliamentary borough of Worcester.

"Dated this 22nd day of August, 1884.

(Signed) "William Thomas Harris, of 24 George Street, Worcester, on the list of parliamentary voters, Division 1, for the parish of St. Martin."

Ninety-seven other persons whose names were set out in an appendix annexed to the case were also objected to by Harris.

[Here followed the names, abode, nature of qualification, and street where the property was situated, of Bollen and the others.]

There are three lists of parliamentary voters for the Blockhouse, viz. 1. Householders and occupiers,—2. Freemen,—3. Lodgers. The name of Walter Bollen was on the parliamentary list, Division 1, for the Blockhouse.

It was contended on behalf of Walter Bollen that the notice of objection given to the overseers was insufficient, inasmuch as the notice did not specify the list of parliamentary voters to which the objection referred, as required by the note to the form of notice of objection given in the schedule of 41 & 42 Vict. c. 26. (1) It was further contended on behalf of Walter Bollen, that the revising barrister had no power to amend the notice of objection.

It was contended on behalf of Harris, the objector, that the omission did not invalidate the notice of objection.

The revising barrister decided that the notice of objection in

(1) Form I. contains a form No. 1, Parliamentary, of "Notice of objection to be given to overseers," addressed "to the overseers of the parish of ——:" and a form, No. 2, Parliamentary, of "Notice of objection to be given to the person objected to," addressed "To Mr. ——:" the objection being in both notices to the name of the voter being retained on the list of persons entitled to vote at the election of members to serve in parliament.

At the foot of Form No. 2 is the following,—"*Note.* If there is more than one list of parliamentary voters, the notice of objection in each of the above two cases, Nos. 1 and 2, should specify the list to which the objection refers; and, if the list referred to is made out in divisions, the notice of objection should specify the division to which the objection refers; and, if the list contains two or more persons of the same name, the notice should distinguish the person intended to be objected to."

the case of Walter Bollen and the notices of objection in the cases of the other persons named in the schedule to the case ought to have specified the list to which the objection referred, and by reason of the omission were invalid.

The revising barrister was then asked on behalf of Harris to amend the notices of objection, under s. 28, sub-s. 2, of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), by supplying the omission, which omission, it was contended, was a "mistake" within the meaning of that sub-section, and that the revising barrister could and ought to correct such mistake.

The revising barrister decided that he had power to amend the notice, and did amend it accordingly, by supplying the omission, and expunged the name of Walter Bollen and the names of the other persons mentioned in the schedule.

If the Court should be of opinion that the revising barrister had no power to amend the notice of objection, the register for the city of Worcester was to be amended by inserting therein the names of Walter Bollen and the ninety-seven persons named in the schedule.

Willis-Bund, for the appellant. The note appended to the form of notice in the schedule to the Act provides that, if there is more than one list of parliamentary voters, the notice of objection "should specify the list to which the objection refers, and, if the list referred to is made out in divisions, the notice of objection should specify the division to which the objection refers." The point is inferentially decided in *Hall* v. *Cropper*. (1) The notice should convey distinct information as to the particular list, householder or lodger, on which the name of the person objected to was to be found. That being so, the notice is bad; and the power given to the revising barrister by s. 28, sub-s. 2, to amend "mistakes," does not extend to the supplying an omission which renders the notice a bad notice. In *James* v. *Howarth* (2), the notice omitted to state that the *objector* was on one of the "parliamentary" lists, whereas here there is a total absence of information as to the list upon which the name of the person objected

(1) 5 C. P. D. 76, 80. (2) 5 C. P. D. 225.

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to appears. Lindley, J. (1), says: "The Act does not require the objector to state on which of the parliamentary lists of voters his name appears: and it is not for us to require more than the Act of Parliament does." The judgment of Lord Chief Justice Coleridge (2) also is strongly in the appellants' favour.

[LORD COLERIDGE, C.J. There was no distinct judgment, but merely an intimation of opinion by my Brother Lindley and myself in that case.]

R. S. Wright, contrà. The notice is perfectly good as it stands: and, if not, it was clearly amendable. It may be that the power of amendment does not exist where the omission in the notice of objection is of a substantial character. But here the notice contains in substance all the information which the statute requires to be given to the overseers; and it is not suggested that they were or could have been misled by it. There is a mere omission to describe the list as accurately as it might have been described. It appears that there are three Blockhouse lists of voters, but only one which has divisions, viz. the list of householders; the lodgers' list is not divided, lodgers having no municipal vote; and the list of freemen is not made out by the overseers. In *James* v. *Howarth* (3) Lord Coleridge says: "It has been contended for the respondent that the word 'parliamentary' was essential, and that its omission was fatal; and upon this short ground, that the forms are by s. 8 to be considered as part of the Act. The word 'parliamentary' was not inserted in the form given in 6 & 7 Vict. c. 18. But, inasmuch as the Act of 1878 deals with both parliamentary and municipal registration, and as s. 15 shews that there may be different lists in the same borough, some parliamentary and some municipal, it must I think be a matter of grave doubt whether or not the word 'parliamentary' was essential to describe the list on which the objector's name appears. It is not necessary upon this occasion to determine the question; and I desire to be understood as expressing no positive opinion upon it, though the inclination of my opinion is strong that it was necessary, and that the revising barrister was right in holding the omission of that word to be fatal. We must, however, take it that the revising

(1) At p. 231. (2) At p. 228.

(3) 5 C. P. D., at p. 228.

barrister was of opinion that the mistake or omission was one which it was beyond his power to amend, but that he would have done so if he had thought he had the power. We are all of opinion that this is a case in which the revising barrister ought to have amended if he had power to do so." And his Lordship came to the conclusion that such power did exist under s. 28, sub-s. 2. In *Adams* v. *Bostock* (1), an objector described himself in the notice of objection as "on the list of parliamentary voters for the parish of H." but omitted to insert his place of abode. He was a solicitor practising at H., was clerk to the magistrates and coroner, and had resided at H. all his life. It was admitted that the insertion of the words "of H." would have sufficiently described the objector's place of abode, and the revising barrister found as a fact that no one had been misled or deceived by the omission: it was held that the omission was a "mistake" within the meaning of 41 & 42 Vict. c. 26, s. 28, sub-s. 2, which the revising barrister had power to amend. The only substantial difference between that case and this is, that there the revising barrister found as a fact that no one had been misled or deceived by the omission, and here the Court can see that no one could have been misled by the mere omission of "list 1."

Willis-Bund, in reply. The overseers, as well as the person objected to, are entitled to have an accurate description of the list upon which the name of the latter is to be found, or, in other words, a strict compliance with the provisions of the Act. In *Freeman* v. *Newman* (2), a notice of objection "dated this eighteenth day of August, one thousand eight hundred and eighty ——," was held to be a defect which invalidated the notice, and was incapable of amendment.

LORD COLERIDGE, C.J. I am satisfied that the power of amendment was properly exercised in this case. I think the notice of objection in this case, though framed in an informal way, is such a notice as was contemplated by the Act. It conforms in substance with the statutory requirements. It states that the names of the persons objected to are in Division 1; that necessarily refers to list No. 1, which is the only list in Blockhouse which

(1) 8 Q. B. D. 259. (2) 12 Q. B. D. 373.

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is divided; and that seems to me to be a literal compliance with the directions of the Act. Sect. 8 enacts that, "in every parliamentary borough, and in every municipal borough the whole or part of the area whereof is co-extensive with or included in the area of a parliamentary borough, the forms in the schedule to this Act, or forms to the like effect, varied as circumstances require, shall be used for the purposes for which the same are applicable respectively, and shall for the purposes of the Parliamentary Registration Acts and this Act be deemed to be substituted for any corresponding forms in the schedules to the Parliamentary Registration Acts. The said schedule and the notes thereto shall be construed and have effect as if enacted in the body of this Act." These notices have been held, and rightly held, to be obligatory. With regard to the power of amendment, I am much indisposed to construe it so as to encourage laxity; but I think it would make it almost nugatory to hold that the revising barrister had not the power to amend or correct mistakes in these notices if the information they are intended to convey is really given, but given in an informal or inaccurate manner. I think the amendment made here was well within his power. I shall always be inclined to hold the exercise of the power of amendment within reasonable limits, because I am well aware of the very strong feelings which are excited in matters of this sort. Unless kept under proper restraint, the agents on both sides will be apt to fall into a degree of laxity which I for one do not feel inclined to encourage. But here I think the information intended to be conveyed was given, though in an imperfect manner. No one can doubt that the notice of objection was intended to point to List 1, Division 1. I think the revising barrister did quite right in amending as he has done.

STEPHEN, J. I am of the same opinion. The information intended to be given was given in a manner which was not quite accurate, though intelligible enough. The notice should have referred to "List 1, Division 1"; but it is plain that the objector intended to do so. He could not have meant anything else; but he has failed accurately to express his meaning. I agree with my Lord as to the propriety of not relaxing the forms

provided by the Act. But I think it would be equally undesirable to encourage the very technical points taken by agents in these matters. I think this appeal must be dismissed, and with costs.

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CAVE, J. I agree with my Lord and my Brother Stephen that this appeal should be dismissed. I desire to reserve to myself freedom of action as to the construction of the 2nd subsection of s. 28. I am clearly of opinion that the revising barrister was quite right in amending. Cases of greater difficulty must arise upon which I shall be prepared to give an opinion when they come before me.

Appeal dismissed.

Solicitor for appellant: *W. H. Stallard, for John Stallard, Worcester.*

Solicitors for respondents: *Church & Cundell, for S. Southall, Town Clerk, Worcester.*

J. S.

IN RE CHAFFERS; EX PARTE THE INCORPORATED LAW SOCIETY.

1885 *Feb.* 18.

Solicitor—Certificate—40 & 41 *Vict. c.* 25, *s.* 23, *and Sched. II.*

Where a solicitor has neglected for a whole year to renew his certificate, the Master of the Rolls only has power to order the registrar of certificates (the Incorporated Law Society) to grant him a certificate for the current year.

The right of a solicitor who has neglected to renew his certificate to apply for a fresh one is not a "right acquired or accrued" within 40 & 41 Vict. c. 25, s. 23, Proviso (B.)

MR. CHAFFERS, who had formerly practised as an attorney and solicitor, but from adverse circumstances had for some years been unable to take out the annual certificates required by the statutes to enable him to continue to practise, in April, 1884, applied to the Master of the Rolls for an order that the registrar of solicitors (the Incorporated Law Society) should grant him such certificate for the current year. That application was opposed on behalf of the Incorporated Law Society, and (as was also a subsequent application in November, 1884,) refused by the Master of the Rolls, in consequence of circumstances of a discreditable character which had appeared on the hearing of a charge of libel

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before a police-magistrate in March, 1872. Mr. Chaffers renewed his application to this Court, on the ground that the materials which were before the Court upon those occasions did not justify the conclusion to which the Master of the Rolls came.

Mr. *Chaffers*, in person, submitted that the right given to him as attorney by the 23rd section of 6 & 7 Vict. c. 73 (1) to apply to the Courts of Law or to a judge thereof for an order to the registrar to grant him a certificate, was not affected by any of the provisions in s. 87 of 36 & 37 Vict. c. 66, s. 14, of 38 & 39 Vict. c. 77, or of 40 & 41 Vict. c. 25.

R. T. Reid, Q.C. (*Hollams* with him), for the Incorporated Law Society. This Court has no jurisdiction in the matter. The 23rd section of 23 & 24 Vict. c. 127, expressly prohibited the registrar from granting a certificate to a solicitor who has neglected for a whole year after the expiration of his certificate to renew the same, except under an order from the Master of the Rolls. Sect. 23 of 40 & 41 Vict. c. 25, enacts that "the Acts mentioned in the first part of the second schedule to this Act are hereby repealed as from the first of January, 1878, to the extent specified in the third column in the said part of that schedule, with the qualification that so much of the said Acts as is set forth in the second part of that schedule shall be re-enacted in manner therein appearing, and shall be of the same force as if enacted in the body of this Act: Provided also that this repeal shall not affect,—(A.) anything duly done or suffered under any enactment hereby repealed, or,—(B.) any *right*, liability, or penalty *acquired*, *accrued*, or incurred under any enactment hereby repealed, or any legal proceeding or remedy in respect of any such right, liability, or penalty, and such legal proceeding and remedy may be carried on as if this Act had not been passed: And the regulations made by certain of the judges of the High Court of Justice in pursuance of the power contained in s. 14 of the Judicature Act, 1875, for adapting the enactments and forms therein mentioned shall as from the 1st of January, 1878, cease to

(1) Under that section the application was, in the case of a solicitor, to the Master of the Rolls, and, in the case of an attorney, to one of the superior Courts of Law of Westminster, or one of the judges thereof.

be of any force or effect." Among the provisions referred to as repealed in the second column of the second schedule, is s. 23 of 23 & 24 Vict. c. 127; and that section is re-enacted in the second part of that schedule in these words,—"If any solicitor of the Supreme Court, after having at any time taken out a stamped certificate, neglects for a whole year after the expiration thereof to renew the same for the following year, the registrar shall not afterwards grant a certificate to such solicitor, except under an order of the Master of the Rolls; and it shall be lawful for the Master of the Rolls to direct the registrar to issue a certificate to such person on such terms and conditions as he may think fit." The jurisdiction to make the order prayed is therefore now exclusively confined to the Master of the Rolls: and the right to apply for a certificate is not a "right acquired or accrued to" the solicitor, within the proviso in s. 23 of the Act of 1877.

LORD COLERIDGE, C.J. It is difficult to see to what the re-enactment of s. 23 of 23 & 24 Vict. c. 127, in the second part of the second schedule to 40 & 41 Vict. c. 25 applies, if not to this case. I must confess I am not without doubt; but, as my Brother Manisty, for whose opinion I entertain the greatest possible respect, does not seem to entertain any, I bow to his judgment. The words of 40 & 41 Vict. c. 127 are in favour of the view taken by the Incorporated Law Society: and this Court as it seems is without jurisdiction. The repeal of s. 23 of 23 & 24 Vict. c. 127 does not affect any right acquired by or accrued to the solicitor: and the re-enactment of that section in the second part of the schedule is absolute. I come to the conclusion that this application must be refused.

MANISTY, J. It seems to me that this Court has no jurisdiction in the matter. The language of the enactment in part 2 of 40 & 41 Vict. c. 25 is absolute and conclusive, unless there is something in the proviso to take it out of that legislation. It enacts that, "if any solicitor of the Supreme Court, after having at any time taken out a stamped certificate, neglects for a whole year after the expiration thereof to renew the same for the following year, the registrar shall not afterwards grant a certificate to

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such solicitor except under an order of the Master of the Rolls; and it shall be lawful for the Master of the Rolls to direct the registrar to issue a certificate to such person on such terms and conditions as he may think fit." What is there to cut down or qualify that enactment? By the first part of the second schedule to that Act, s. 23 of 23 & 24 Vict. c. 127,—which was in the same words as the section I have read,—is repealed. It is the proviso in that section which raises the doubt, viz. that this repeal shall not affect "any right acquired or accrued under any enactment thereby repealed." Now, the right which the applicant claims to have acquired, is, a right to take out his annual certificate. He had no such right. There was a form by which he might come and acquire the right: but he had no absolute right. The question is whether he now by the form prescribed obtains the right. It appears that down to the year 1866 Mr. Chaffers took out his certificate; and that he then ceased to take it out, and had no longer a right to practise. He had no right to have a certificate granted to him if for twelve months he had omitted to take it out. There was a mode by which he might come and acquire the right; but that mode has been altered. Reading it in that way, it seems to me that the proviso is perfectly clear. I will put this illustration:—This Act passed in 1877, on the 23rd of July. Suppose that before that Act passed the applicant had come to this Court, and obtained an order which gave him the right to take out his certificate: he would then have acquired the right; and, although the registrar is prohibited from granting a certificate, except under an order of the Master of the Rolls, seeing that the applicant had obtained the right by an order made but not acted upon, but which he had a right to act upon, before the Act passed, then he would have had a right to go to the registrar and say, "Although you are prohibited from granting me this certificate except under an order of the Master of the Rolls, I have acquired a right to it by the order of the Queen's Bench;" and that would have satisfied what appears to me to be the meaning, or at all events one of the meanings, of the proviso. It seems to me that that was the intention of the legislature, and that the mode in which the right is hereafter to be acquired is well laid down: but here the applicant has acquired no such right. I will not

say that it is clear: indeed I should be slow to say so after the doubt which my Lord has expressed: but, to my mind, that is the result of the legislation, and therefore I am of opinion that we have no jurisdiction to entertain this application.

No order.

The applicant in person.

For the Incorporated Law Society: *Williamson.*

J. S.

WELDON *v.* NEAL. *April* 27.

Prisoner—Habeas Corpus—Party to Motion.

The Court cannot grant a habeas corpus to a party to a suit, in custody, to enable him to appear in Court merely for the purpose of arguing his case in person.

Benns v. *Mosley* (2 C. B. (N.S.) 116) followed.

APPEAL against a refusal by Pollock, B., at chambers, to grant a writ of habeas corpus directed to the keeper of Holloway Gaol to bring up Mrs. Weldon, a married woman, who was detained in that place under a sentence of six months' imprisonment for a libel, in order to enable her to appear in Court to argue in person a rule for a new trial.

Rose-Innes (*F. C. Philips* with him), for the plaintiff, submitted that Mrs. Weldon had not by her conviction forfeited her civil rights, one of which was the right to be brought into this Court for any legitimate purpose by a writ of habeas corpus under 44 Geo. 3, c. 102; that, although the ordinary forms of the writ were ad testificandum or ad subjiciendum, it was nevertheless competent to the Court in its discretion to grant a habeas for the purpose of enabling a party to a suit or proceeding (being in custody) to appear in Court to hear or to conduct his action or defence, upon a proper case being made out; and that there were numerous cases in the books where this had been allowed. In *Attorney-General* v. *Fadden* (1), the identity of the person of a defendant to an information being in question, he being in prison, a habeas corpus was granted by the Court of Exchequer

(1) 1 Price, 403.

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to bring him up to be present at the trial. The Court, "under the circumstances, and on the authority of a certificate of the Clerk of the Rules in the King's Bench that similar applications had been made in that Court and allowed, granted the application on condition of the defendant being brought up on a day certain, and paying the costs of being brought up and remanded,—intimating that the writ should be in the form of the habeas corpus ad testificandum."

[GROVE, J. There the party was in effect to be brought into Court to give evidence.]

In *Attorney-General* v. *Cleave* (1), a defendant was charged with selling unstamped papers, and (he being in custody) the Court of Exchequer granted a habeas corpus for the purpose of enabling him to be brought up to defend himself in person. *In re Cobbett* (2), Pollock, C.B., thus qualifies his refusal to grant a similar application,—"Without saying that there can exist no case in which the Court would permit that to be done, it is sufficient to say that in this case the Court in its discretion does not think Mr. Cobbett ought to have a habeas corpus to bring him here merely for the purpose of conducting his own case."

[MANISTY, J. There is a comparatively modern case which is exactly to the point. In *Benns* v. *Mosley* (3), it was decided that the Courts have no power to issue writs of habeas corpus to bring up persons for the purpose of moving for or shewing cause against rules,—there being no writ known to the law which is applicable to such a purpose. Cockburn, C.J., in giving judgment, after time taken to consider, says: "We have consulted with the judges of the Courts of Queen's Bench and Exchequer; and we all concur in thinking that, although a practice had at one time prevailed of granting such applications as the present, that practice was erroneous. Indeed, it is long since those two Courts came to the conclusion not to grant them." And, after referring to *Ford* v. *Nassau* (4), *Attorney-General* v. *Hunt* (5), *Rex* v. *Parkyns* (6), and *Attorney-General* v. *Cleave* (7), his Lordship concluded thus,—"It

(1) 2 Dowl. 668.
(2) 27 L. J. (Ex.) 199.
(3) 2 C. B. (N.S.) 116.
(4) 9 M. & W. 793; 1 Dowl. (N.S.) 631.
(5) 9 Price, 147.
(6) 3 B. & A. 679.
(7) 2 Dowl. 668.

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is plain, therefore, that we have no power to do that which is asked."]

Clark v. *Smith* (1) is a strong authority in support of the application, to refuse which will be an absolute denial of justice.

R. H. Simonds, for the defendant, was not called upon.

GROVE, J. This appeal must be dismissed with costs. The decision of the Court of Common Pleas, after consultation with the judges of the other two Courts, is conclusive. We have no power to do that which is asked.

MANISTY, J. I am of the same opinion. It is impossible to get over the case of *Benns* v. *Mosley*. (2)

Appeal dismissed.

Solicitor for plaintiff: *John Hughes.*

Solicitor for defendant: *Neal.*

J. S.

[IN THE COURT OF APPEAL.]

June 25.

THE LONDON AND YORKSHIRE BANK, LIMITED *v.* COOPER AND OTHERS.

Practice—Production of Documents—Documents held in Right of Another, Production of, when ordered—Company—Voluntary Winding-up—Liquidator—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 155.

In an action on a promissory note, made by the defendant as security for the repayment of moneys due to the plaintiffs from a limited company, the defendant objected to produce documents relating to the matters in question in the action, being the banker's pass-book and directors' minute-book of the company, on the ground that they were in his custody only as liquidator in the voluntary winding-up of the company. The company had been dissolved before the application for the discovery of documents was made, but no resolution had been passed under the Companies Act, 1862, s. 155, for the disposal of the documents belonging to it:—

Held, that the plaintiffs were entitled to the inspection of the documents, inasmuch as the defendant had them in his absolute control.

Decision of the Queen's Bench Division (ante, p. 7) affirmed.

APPEAL of the defendant Wing, and appeal of the defendant Cooper, from an order of Lord Coleridge, C.J., and Field, J., for the inspection of certain documents.

(1) 3 C. B. 982. (2) 2 C. B. (N.S.) 116.

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LONDON AND YORKSHIRE BANK v. COOPER.

The facts of the case are set forth in the report of the proceedings before the Queen's Bench Division (1), and also may be gathered from the above head-note.

R. O. B. Lane, for the defendant Wing. The question is, whether an inspection of documents can be ordered against the defendant Wing, they having come into his possession as liquidator of a company, which has been dissolved by a voluntary winding-up. It must be admitted that unless the members of the company have control over the defendant, he is bound to produce the documents of which inspection is sought; but he has them in his custody merely as agent of the members of the company, and therefore he is not liable to produce them. The documents are not under his control.

Forbes, Q.C., for the defendant Cooper.

E. Bray, for the plaintiffs, was not called upon to argue.

BRETT, M.R. The question is whether the defendant, Wing, is bound to submit to an order for the inspection of certain documents in his custody. It has been argued that the documents are not in his control; but if they are in his possession, they are primâ facie under his control. The defendant, Wing, may shew that he is the servant or the agent of some other person, and that there is somebody who has power to prevent the production of the documents. The defendant, Wing, says that the documents in question are the documents of a company, which has gone into voluntary liquidation, and of which he has been appointed liquidator. The Companies Act, 1862, s. 155, applies in the present case: it is true that no resolution has been passed by the company within the meaning of that enactment; but whilst matters stand as they are, he, as liquidator, is bound to keep the documents for five years, although at the end of that time he may burn them. He is bound to keep them during that period, but who is there that can give to him any order respecting them? No one has the control of the documents, and he is as to their production the absolute and sole master; he has the absolute control of them, and therefore he is bound to produce them. I

(1) Ante, p. 7.

cannot think that a company, which has been voluntarily wound up and dissolved without passing any resolution as to the disposition of the documents belonging to it, has any property in, or control over, them.

BAGGALLAY, L.J. I am of the same opinion. The defendant, Wing, is a party to an action, and primâ facie he is bound to produce all documents in his possession, custody, or power. He alleges that he has not the control, but only the custody, of the documents in question, because he is the liquidator of a company that has been wound up voluntarily and dissolved. But before its dissolution the company did not pass any resolution disposing of the documents belonging to it under the provisions of the Companies Act, 1862, s. 155. Therefore he has the absolute control of the documents in question. The order of the Queen's Bench Division for the production of the documents was right.

BOWEN, L.J., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Deacon, Son, & Gibson, for Vickers, Son, & Brown, Sheffield.*

Solicitors for defendants: *J. & R. Gole, for Pashley & Hodgkinson, Rotherham.*

J. E. H.

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Aug. 6

THE MOGUL STEAMSHIP COMPANY *v.* M'GREGOR, GOW, & CO.

Combination or Conspiracy to effect an unlawful Object—Interim or Interlocutory Injunction—Irreparable Damage.

A confederation or conspiracy by an associated body of ship-owners which is calculated to have and has the effect of driving the ships of other merchants or owners, and those of the plaintiffs in particular, out of a certain line of trade, —even though the immediate and avowed object be, not to injure the plaintiffs, but to secure to the conspirators themselves a monopoly of the carrying trade between certain foreign ports and this country,—is, or may be, an indictable offence, and therefore actionable, if private and particular damage can be shewn.

To warrant the Court, however, in granting an interim or interlocutory injunction to restrain the parties from continuing to pursue the objectionable course, those who complain must at least shew that they have sustained or will sustain "irreparable damage,"—that is, damage for which they cannot obtain adequate compensation without the special interference of the Court.

STATEMENT OF CLAIM. 1. The plaintiffs have suffered damage by reason of the defendants, as and being owners of numerous steamers trading between ports in the Yangtse-Kiang river and London conspiring together and with other persons at present unknown to the plaintiffs to prevent the plaintiffs from obtaining cargoes for steamers owned by the plaintiffs, from shippers, to be carried from ports in the said river to London, for reward to the plaintiffs in that behalf.

2. The said conspiracy consisted and consists of a combination and agreement by and amongst the defendants, as and being owners of steamers trading as aforesaid, and having by reason of such combination and agreement control of the homeward shipping trade, pursuant to which shippers were and are bribed, coerced, and induced to agree to forbear, and to forbear, from shipping cargoes by the steamers of the plaintiffs.

3. In the alternative, the said conspiracy consisted and consists of a combination and agreement by and amongst the defendants, as and being owners of steamers as aforesaid, pursuant to which the defendants, with the intent to injure the plaintiffs and prevent them obtaining cargoes for their steamers trading between the said ports, agreed to refuse, and refused, to accept cargoes from shippers except upon the terms that the said shippers should

not ship any cargoes by the steamers of the plaintiffs, and by threats of stopping the shipment of homeward cargoes altogether, which threats they had power and intended to carry into effect, did and do prevent shippers from shipping cargoes by the plaintiffs' steamers, and threaten and intend to continue to do so.

The plaintiffs claim:—1. Damages,—2. An injunction to restrain the defendants from continuing the wrongful acts hereinbefore mentioned.

The facts in support of an application on the part of the plaintiffs for an interlocutory or interim injunction were substantially as follows:—

The plaintiff company is a shipping company which was incorporated in the year 1883 for the purpose of acquiring shares in certain steamships, viz. the *Sikh*, *Afghan*, *Pathan*, and *Ghazee*, and it accordingly acquired and became the owner of a large number of shares in these ships. The ships were built for the purpose of being employed in the China and Australian trades, and had earned a high reputation in those trades. A "ring" had been formed by the defendants, who were large shipping companies and owners (including one which had a subsidy from the government to carry mails to China), for the purpose of working and acquiring the control over the shipping trade between China and England,—the object of the "ring" being, as was sworn, amongst other things, to injure and ruin the plaintiffs as shipowners in the China trade, and drive them out of it. With this object, the defendants had widely distributed among the China merchants circulars to the following effect:—

"Shanghai, 10th May, 1884.

"To those exporters who confine their shipments of tea and general cargo from China to Europe (not including the Mediterranean and Black Sea ports) to the P. and O. Steam Navigation Co.'s, Messagerie Maritime Co.'s, Ocean Steamship Co.'s, Glen, Castle, Shire, and Ben lines, and to the steamships *Copack* and *Ningchow*, we shall be happy to allow a rebate of 5 per cent. on the freight charged.

"Exporters claiming the returns will be required to sign a declaration that they have not made nor been interested in any shipments of tea or general cargo to Europe (excepting the ports above named) by any other than the said lines.

"Shipments by the steamships *Afghan*, *Pathan*, and *Ghazee* on their present voyages from Hankow will not prejudice claims for returns.

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"Each line to be responsible for its own returns only, which will be payable half-yearly, commencing 30th October next.

"Shipments by an outside steamer at any of the ports in China or at Hong Kong will exclude the firm making such shipments from participation in the return during the whole six monthly periods within which they have been made, even although its other branches may have given entire support to the above lines.

"The foregoing agreement on our part to be in force from the present date till 30th April, 1885."

In May, 1885, the defendants caused to be issued to the shippers and merchants in China another circular, as follows:—

"Shangai, 11th May, 1885.

"Referring to our circular dated 10th May, 1884, we beg to remind you that shipments for London by the steamships *Pathan*, *Afghan*, and *Aberdeen*, or by other non-conference steamers, at any of the ports in China, or at Hong Kong, will exclude the firm making such shipments from participation in the return during the whole six monthly periods in which they have been made, even although the firm elsewhere may have given exclusive support to the conference lines."

In consequence of these circulars and the conduct of the defendants, the plaintiff-company had been unable to obtain freights for their ships, and had been virtually driven out of the China trade. It was further sworn that "the defendants threatened to continue by the use of the intimidation aforesaid to prevent the *Ghazee* and all other vessels in which the plaintiffs were interested from obtaining any freight and cargo in China, and thus to prevent the plaintiff company from carrying on their lawful business as shipowners, and making profit."

July 31, 1885. *Sir Henry James, Q.C.*, moved for an injunction to restrain the defendants from conspiring together and with other persons unknown, by undue means to prevent the plaintiffs from obtaining cargoes for their steamers from certain ports in China to this country. (1) That which is complained of is, an illegal combination or conspiracy on the part of the defendants to "boycott" the plaintiffs, by means of circulars addressed by them to merchants in China, and otherwise, in order to prevent the plaintiffs from obtaining freights for their vessels; one mode by which this conspiracy is to be worked out being the imposition

(1) The application was originally made to Day, J., at chambers, and was by him referred to the Court.

of a penalty upon all those merchants and others who do not succumb to their influence, by refusing to allow them, as they do to others who ship exclusively by their vessels, a rebate of 5 per cent. on all freights on shipments made by them within a given period. This is a penalty which is excessive and unreasonable, and goes far beyond the necessities of their own fair protection,—a penalty which is to operate even though the "ring" has no vessel ready at the port to receive freights; and therefore it is an undue and unreasonable restraint of trade, and contrary to public policy: the result being that the plaintiffs' trade from the Chinese ports has been virtually ruined. There is abundant authority to shew that a combination of this kind is the subject of an indictment at common law; and, if so, it is clearly actionable: see the judgments of Grose, J., in *Rex* v. *Mawbey* (1); of Alderson, B.. in *Hilton* v. *Eckersley* (2); of Tindal, C.J., in *Gregory* v. *Duke of Brunswick* (3); of the same learned judge in *O'Connell* v. *The Queen* (4); and the summing-up of Lord Fitzgerald in *The Queen* v. *Parnell.* (5)

[FRY, L.J. The difficulty I feel is that we are asked to interfere to prevent the defendants from carrying on their trade in the manner they conceive to be the most beneficial to themselves; and this before trial of the action. Is there any authority for that, unless the circumstances are very exceptional? And, if this is an indictable offence, did the Court of Chancery ever interfere by injunction to restrain the commission of a crime?]

Direct authority is not to be expected. To the honour of British merchants, the thing complained of is a novel invention. But the defendants have no right to carry on their trade so as by means of a confederation like this to render it impossible for the plaintiffs to carry on theirs.

[LORD COLERIDGE, C.J., referred to the picketting case, *Reg.* v. *Druitt.* (6)]

This clearly comes within the definition of an unlawful con-

(1) 6 T. R. 636.
(2) 6 E. & B. 47.
(3) 6 M. & G. 205, 953.
(4) 11 Cl. & F. 155, 233.
(5) "The Times" of Jan. 25, 26, 1881.
(6) 10 Cox, C. C. 592.

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spiracy, as given in the judgments above referred to. (1) And it is competent to this Court to grant the injunction as prayed, under s. 25, sub-s. 8, of the Judicature Act, 1873.

August 3. *Davey*, *Q.C.*, *Finlay*, *Q.C.*, and *Pollard*, shewed cause. This application is a complete novelty: no authority has been or could be cited to warrant it. The argument on the part of the plaintiffs confounds the object with the result. The object which the defendants had in view was a perfectly legitimate one, viz. to benefit themselves, not to injure or embarrass the plaintiffs; though it may be that in the result the plaintiffs may sustain some damage. But, at all events, it is not a case for an interlocutory injunction, when the facts are not fully before the Court, and no irreparable damage is or can be alleged or proved. What is the supposed cause of action? The whole sting of the charge is that the defendants have held out to the shippers of goods from China the promise of a rebate or return of 5 per cent. on the agreed freight for the carriage of goods by their ships, provided they are exclusively employed for a given period. What is there illegal in that? It is not competent to this or any other Court to dictate to ship-owners what amount of freight they shall exact.

[LORD COLERIDGE, C.J. The charge is, that the defendants have *conspired* for the purpose of carrying on a particular trade in such a manner as to prevent the plaintiffs from trading at all. "The illegal combination is the gist of the offence:" per Lord Mansfield, in *Rex* v. *Eccles*. (2) That was an indictment for conspiring by indirect means to impoverish a man, by preventing him from working at his trade. The parties were convicted, and had six months' imprisonment.]

That case would hardly be considered law at the present day: see *Reg.* v. *Rowlands*. (3) Before the Judicature Act, 1873, it was a settled rule in Chancery that no injunction would issue to restrain the commission of a criminal offence; for instance, the publication of a libel: *Provincial Assurance Co.* v. *Knott* (4);

(1) And see Russell on Crimes, 5th ed., vol. 3, p. 109, where the authorities are collected.

(2) Lea. C. C. 274, 276.

(3) 17 Q. B. 671.

(4) Law Rep. 10 Ch. 142.

Saxby v. *Easterbrook* (1): and see *Fisher & Co.* v. *Apollinaris Co.* (2)

[FRY, L.J. I followed *Saxby* v. *Easterbrook* (1) in *Thomas* v. *Williams*. (3)

LORD COLERIDGE, C.J. I must confess I do not see why, if it is made out to the satisfaction of the Court that irreparable injury is likely to accrue to the plaintiffs an injunction should not issue before trial. Why should not the plaintiffs be saved from ruin?]

It is possible that a case might arise where such a course would be proper. But not where, as here, the event of the action is doubtful, or the chances are at all events even. That would be going far beyond anything that has yet been done. Seeing the nature of the trade in question, where there is great competition during a certain season, viz. what is called the "tea season," and an almost total dearth of business during the rest of the year, and seeing the great advantage to exporters of having a continuous line of ships throughout the year, there is nothing unreasonable or improper in the inducement which the defendants hold out for the purpose of obtaining an exclusive patronage. There is no restraint of trade, as is suggested; no penalty. It is nothing more than a legitimate mode of securing to themselves a fair remuneration for the accommodation which the defendants afford to their customers.

[LORD COLERIDGE, C.J. That argument rings right; but it scarcely harmonizes with the tone of the defendants' circular.]

In *Gregory* v. *Duke of Brunswick* (4), the gravamen was a conspiracy to drive an actor off the stage,—a *malicious* combination to ruin him. Such a combination would of course afford a good cause of action. The definition of a conspiracy, as given by Erle, J., in his summing-up in *Reg.* v. *Rowlands* (5) cannot be disputed. A combination by workmen to obtain better wages is lawful, so long as the object and purpose are not to injure another. And see the judgment of Garrow, B., in *Wickens* v.

(1) 3 C. P. D. 639.
(2) Law Rep. 10 Ch. App. 297.
(3) 14 Ch. D. 864.
(4) 6 M. & G. 205, 953.
(5) 17 Q. B. 671.

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Evans (1), the summing-up of Bramwell, B., in *Reg.* v. *Druitt* (2), and the opinion of the judges delivered by Tindal, C.J., in *O'Connell* v. *The Queen.* (3)

Sir Henry James, Q.C., in reply. The object of the confederation, or "conference," as they call themselves, undoubtedly is to drive the plaintiffs' ships out of the particular trade; and the injury is palpable, and obviously irreparable. It is impossible to doubt that a jury would say that what the defendants have done was done maliciously. If the object and the means by which that object is to be attained are both unlawful, it is not necessary to allege malice in its worst and most offensive sense. The object of the plaintiffs is to stop the publication of the circular. Whatever the motive, if the offence charged is an indictable one, and a cause of action, the defendants ought to be restrained.

Cur. adv. vult.

Aug. 6, 1885. The judgment of the Court (Lord Coleridge, C.J., and Fry, L.J.,) was delivered by

LORD COLERIDGE, C.J. This case was heard at some length before my learned Brother Fry and myself; and I have now to deliver the judgment, in which my learned Brother entirely concurs.

It was an application on behalf of the plaintiffs for an injunction to restrain the defendants from doing that which was called throughout the case,—and which I really see no reason for hesitating to call also,—boycotting the plaintiffs. It seems that a large number of important and rich ship-owners joined together, and they issued two circulars or documents (which may be treated substantially as one) to the different traders and their agents with whom they had been in the habit of dealing in the tea trade and other trades in China,—especially the former,—to the effect that, if the persons whom that circular reached and was meant to affect should deal with the plaintiffs or the plaintiffs' ships, they the defendants would deny them all the benefits, or at least a

(1) 3 Y. & J. 318, 328. (2) 10 Cox, C. C. 592.
(3) 1 Cl. & F. 155, 234.

very large and substantial benefit, which hitherto had accrued to them in their dealings with the defendants. The defendants, as they call themselves, and I prefer to use the name they call themselves, being a "conference" of ship-owners, agreed that, if the persons to whom they addressed the circular would deal exclusively with them, they should have certain advantages at their hands; and that, if they did not deal exclusively with them, but should even to the extent of a very small portion of cargo deal with any other ship-owner, they should lose all the advantages which otherwise they would derive from dealing with the defendants. That is, undoubtedly, what the defendants have done: and the plaintiffs allege that the result as far as it concerns them has been and will be to drive them out of the China market, and render it impossible for them to run their line of steamers at remunerative rates. In short, the plaintiffs contend that this is a combination or conspiracy on the part of the conference to exclude from the China market the ships of the plaintiffs; and that it is done for the purpose of injuring them; and that it is against public policy, inasmuch as it is an undue interference with trade,—even though it should work no injury to the plaintiffs.

I do not at this moment attempt to deal with the counter-statement of the case on the part of the defendants. I do not forget it; and I do not at all suggest that it is not weighty and important; but for the moment I pass it by, and I assume for the purpose of this decision that the plaintiffs could establish substantially what I have stated, and that there is no case that could prevail against it.

Now, it is to be observed that this is an application for an interlocutory or interim injunction before the trial of the action. It is certainly conceivable that such a conspiracy,—because conspiracy undoubtedly it is,—as this might be proved in point of fact: and I do not entertain any doubt, nor does my learned Brother, that, if such a conspiracy were proved in point of fact, and the intuitus of the conspirators were made out to be, not the mere honest support and maintenance of the defendants' trade, but the destruction of the plaintiffs' trade, and their consequent ruin as merchants, it would be an offence for which an indictment for conspiracy, and, if an indictment, then an action for

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conspiracy, would lie. It seems to both of us to be within the principle of an old case decided by Lord Mansfield, *The King* v. *Eccles* (1): and although it may be true that the illustration by the learned judge in that case may be open to observation, and although it may have pleased Sir William Erle in a later case (2), to animadvert upon the illustration so given by Lord Mansfield, so far as I know, the case itself, for the principle of law which it defines, is as good law now as when Lord Mansfield enunciated it, and would be upheld at the present day. It seems to me also to be within the principle neatly stated by Tindal, C.J., in *O'Connell* v. *The Queen* (3), as to what evidence is necessary to make out conspiracy, and also of the opinion of Lord Fitzgerald in the case of *Reg.* v. *Parnell.* (4) If the judgment of that learned judge which has been read to us is correct,—and I do not mean to intimate the slightest doubt as to its correctness,—that a conspiracy to do the thing which has been called by the name of boycotting is unlawful and an indictable offence, and, if so, then a thing for which an action will lie, an action may well lie for that which is complained of here. I find it difficult to distinguish the facts of this case, if they are made out in full, from the general outline of those of the case before Lord Fitzgerald. It is also clear that, supposing the allegations here could be established in point of fact, the damages in such a case might be extremely heavy. They might be what are called exemplary or vindictive damages; such, indeed, as it might severely tax the resources of the conference to pay. That, I think, cannot be denied. But then arises the question whether, admitting all this, as I do for the purpose of this decision, admitting all these facts to be capable of proof, this is a case for an interlocutory or interim injunction.

Now, my learned Brother's experience in matters of this sort is much greater than my own: and, after much anxious discussion, we have come to the conclusion that this is not a case for the issuing of an interlocutory injunction, and for many reasons. First of all because, although conceivably, as I have already stated, the cause of action is one within the limits of legal idea

(1) 1 Lea. C. C. 274, 276.
(2) 17 Q. B. 671.
(3) 11 Cl. & F. 234.
(4) "The Times" of Jan. 25, 26, 1881.

and capable of proof, yet every one must see that it is a case in which the proof is extremely difficult; and here it is that the case put forward by the defendants comes in with great weight. The defendants do not deny the issue of the circular; but they put a totally different complexion upon it,—one which at least is plausible, and which it is possible they may be able to persuade a jury to adopt. They say that this is not imposing upon the plaintiffs' trade an extravagant or exaggerated penalty in any sense. I use the word "penalty" now in the loose sense in which, no doubt, it was intended to be used by Mr. Davey. It is no more, the defendants say, than they have a perfect right to do in the fair protection of their own very large trade. They say in effect, we are running a line of steamers all the year round between this country and China; whereas the plaintiffs, who were originally an Australian company, trade to China, not all the year round, but only during what is called the "tea season;" and it is essential to us, in order that we may be able to give the merchants who trade between this country and China the advantage of a line of steamers all the year round, to be able to protect ourselves at this particular season, and recoup ourselves the losses we sustain by running our ships during the season of short loading and low freights. Whether they say so truly,—I do not mean veraciously or accurately,—is altogether another matter. They say it; and, as I observed with regard to the case of the plaintiffs, without deciding that they are right, it is plain they may be so: and so, without deciding the case against the defendants, it is plain that they also may be right. It is entirely, as it seems to us, a matter to be decided by-and-bye before a jury or a judge or whatever tribunal may be called upon to determine which of the two contentions is made out in point of fact. That being so, it would be a very strong thing for this Court to anticipate the decision of so doubtful a matter by the issuing of an interlocutory injunction.

In the next place, it is to be considered, that, even assuming that the plaintiffs are right in their contention, it will be competent to the jury at the trial to award, and I have no doubt they will award, the plaintiffs abundant damages to compensate them for the injury that they may have sustained at the hands of the

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defendants. I have always understood, and I am confirmed in that understanding by the larger experience of Lord Justice Fry, that that is almost of itself a reason for not issuing an injunction prior to the trial of the action. If the plaintiffs establish their case by the verdict of the jury or the decision of the judge, they will get all they are entitled to.

Next, this does not appear to me to be a case in which, as I was at one time inclined to think, the plaintiffs can sustain irreparable injury by our declining to grant the relief prayed. It may be that they will suffer some damage; it may be that they will for a time have a difficulty in carrying on their China trade, or may have to carry it on at a loss. But injury of that sort differs altogether from the injury which is called "irreparable," to prevent which injunctions have heretofore been granted in the Court of Chancery, and are now allowed to issue from this Court. For instance, if a fine old ornamental tree in a nobleman's park be cut down, the injury is practically irreparable, and cannot be compensated in damages. It is in cases of that nature that an interim injunction issues. The injury here, if it be made out, obviously is not one of that character.

Then, further, there are circumstances in this case which appear to us to disentitle the plaintiffs to this extraordinary interference. In the first place, the state of things complained of has gone on since the year 1879: it has been known to exist for six years. The plaintiff company was not formed until 1883. To use an analogy derived from another branch of the law, the plaintiffs came to the nuisance. They were aware of the existence of the first circular, and well knew at the time of the inception of the company what the defendants proposed to do. Now, these are all circumstances which, as it seems to me, ought clearly to be taken into account in dealing with a matter of this sort.

Further, the plaintiff company is primarily speaking an Australian company, as we understand. It has added to itself and its adventure the running to China, and this after full notice of the state of things in China, and after notice of what this conference of traders had intended to do, and had so far back as 1879 intimated that they would do. Thus, it appears to me that there was delay in seeking this exceptional remedy. The injury

complained of is not irreparable; there is no infringement of any right which affects the enjoyment of life; no restraint of freedom of personal action; none of those considerations which besides the head of irreparable injury have induced the Courts to interfere by injunction before the trial of the action.

It is admitted that this is a novel application; and, although certainly,—and here I am speaking for myself, and I think also for my learned Brother,—that would not be by any means an insuperable objection, provided we saw that justice required us to exercise the power that is invoked, still it is a matter that is not to be disregarded. In so important a matter as this, knowing what trade is, one cannot help thinking, in spite of the boasted fairness of British merchants, that attempts to establish a monopoly like this must have been made in remote countries. From the absence, therefore, of anything like an authority, and for the reasons I have already given, my learned Brother and myself think that this is far too doubtful a matter to justify us in issuing for the first time the injunction which is prayed for.

We therefore refuse the motion, and refuse it with costs.

Motion refused.

Solicitors for plaintiffs: *Gellatly, Son, & Walton.*
Solicitors for defendants: *Freshfields & Williams.*

J. S.

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Aug. 10.

In re WILLIAM FLINT.

Habeas Corpus—Military Law—Canteen-Steward—Army Act, 1881, 44 & 45 *Vict. c.* 58, *s.* 176, *sub-s.* 4.

A canteen-steward appointed by the commanding officer of the district, acting under a committee consisting of three officers, and having no interest in the profits of the canteen, but receiving such pay or allowance as the committee may think fit to award him, and being liable to dismissal at the pleasure of the committee, though performing no military duty, wearing no uniform, bearing no arms, and having free ingress and egress at his pleasure to and from the barracks, —is still a person subject to military law within s. 176, sub-s. 4, of the Army Act, 1881.

WILLIAM FLINT had served in the army down to the year 1878, when he was discharged with a pension of 2*s.* 3*d.* per day. He afterwards carried on business as a publican, and ceased to be amenable to military law. In May, 1879, he was requested by the officer commanding the 10th brigade-depôt to take over the duties of canteen-steward at Bradford, and this he did on the 1st of July in that year. In April, 1880, he came to York with the depôt, which afterwards became the 14th regimental district; and he remained there acting in the capacity of canteen-steward until the 6th of July, 1885. He was not placed on the strength of the Queen's army in any way whatsoever; nor did he, as he contended, make himself amenable to military law as then defined by the Mutiny Act of 1878 (1); nor did he become amenable to the military law as defined by the Army Discipline Act, 1879 (2); nor had he since become amenable to the Army Discipline Act, 1881 (3), or any Act relating to military law.

Under the Queen's regulations, the canteens on the regimental system are carried on by a standing committee of three officers; the commanding officer having the power of appointing a permanent canteen-serjeant in a regimental depôt from among the pensioners, whose appointment is confirmed when approved by the general officer commanding the district, without reference to head-quarters or to the War Office. The canteen-steward is under the orders of the committee of officers, and his position is

(1) 41 Vict. c. 10. (2) 42 & 43 Vict. c. 33.
(3) 44 Vict. c. 9.

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that of steward or salesman only, he having no interest in the profits. Regimental canteens, as well as canteens held by fixed tenants, are established in barracks for the exclusive use and convenience of the troops and for the ready supply to them at reasonable prices of wines, malt liquors, grocery, and other articles. The profits in the case of canteens held by tenants go to the tenants; but, in the case of regimental canteens, they go to the regiment, and are dealt with by the committee of officers.

Flint performed no military duty, wore no uniform, bore no arms, and was at liberty to go in and out of barracks as and when he pleased. He was paid, not out of any money supplied by the Secretary of State for War, but solely out of the canteen fund administered by the committee, at their discretion; and he was liable to be dismissed at a moment's notice. He was so dismissed on the 6th of July, 1885, and thereupon all his connection with the depôt ceased.

On the 6th of July, 1885, the day of his dismissal, Flint was placed under arrest, and was kept under what is called "close arrest" for eleven days; and thenceforth until the present time he was under "open arrest," that is, confined to barracks, and was awaiting his trial by a court martial upon charges of which no particulars had yet been delivered to him,—though it was supposed it was intended to charge him with having received bribes.

Yarborough Anderson moved for a rule for a habeas corpus to bring up Flint for the purpose of discharging him from restraint, on the ground that, upon his dismissal from his office of canteen-serjeant, he had ceased to be any longer under the orders or control of the officer in command of the military depôt, and was therefore entitled to be tried for any offence of which he might be guilty before the ordinary tribunals, and not by a court martial. If he had been inrolled under the Reserve Forces Act of 1882 (44 & 45 Vict. c. 48), s. 3, it might have been said that he was under military law; but, not being so inrolled, he is a person who is employed in a civil capacity, as a mere salesman in the canteen. If he had absented himself, he could not have been apprehended as a deserter. The simple question is, whether he is

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within s. 176, of the Army Act, 1881 (44 & 45 Vict. c. 58), which enacts that "the persons in this section mentioned are persons subject to military law as soldiers, and this Act shall apply accordingly to all persons so specified, that is to say," amongst others, "All pensioners not otherwise subject to military law, who are employed in military service under the orders of an officer of the regular forces:" sub-s. 4.

LORD COLERIDGE, C.J. It appears to me that William Flint was a person subject to military law as a soldier, within s. 176, sub-s. 4, of the Army Act, 1881. He was the canteen-steward or person in charge of a canteen, a purely military establishment which is attached to and follows the army wherever it goes. He was a person "not otherwise subject to military law," who was "employed in military service under the orders of an officer of the regular forces." He is therefore a person who upon every fair construction of the Act and the Queen's Regulations is subject to all the regulations of the army.

BUTT, J., concurred.

Rule refused.

Solicitors for applicant: *Monckton, Long, & Gardiner, for Anderson & Lythe, York.*

J. S.

KENNEDY *v.* LYELL. 1885 *May* 18.

Title to Land—"Pretenced"—Buying of—Forfeiture—32 Hen. 8, *c.* 9, *s.* 2; 8 & 9 *Vict. c.* 106, *s.* 6—*Knowledge of Buyer.*

In an action for a forfeiture under 32 Hen. 8, c. 9, s. 2, against the buyer of a right of entry, since 8 & 9 Vict. c. 106, s. 6, the onus is upon the plaintiff to prove not only that the title purchased was bad, but also that the buyer knew that it was "pretenced," i.e. fictitious, or bad in fact. The mere fact that the right purchased was barred by the Statute of Limitations at the time of the purchase does not necessarily render the title "pretenced" within the meaning of the 32 Hen. 8, c. 9.

FURTHER CONSIDERATION.

The facts and arguments sufficiently appear in the judgment.

Gully, Q.C., Smyly, and *Lee Clare,* for the plaintiff.

C. Russell, Q.C., A. T. Lawrence, and *McClymont,* for the defendant.

18th May. DENMAN, J. This action was brought in the Chancery Division, claiming on behalf of the plaintiff the sum of 5000*l.* as being one half the value of certain property in Manchester, by virtue of the statute 32 Hen. 8, c. 9, s. 2.

That statute, after reciting "that the true and indifferent trials of such titles, as been to be tried is let and hindered by (amongst other things) buying of titles and pretended rights of persons not being in possession," enacted by s. 2 as follows: "that no person shall from henceforth bargain, buy, or sell, or by any ways or means obtain, get, or have any pretenced rights or titles, or take promise, grant, or covenant to have any right or title of any person or persons in or to any lands, &c. (except such person or persons which shall so bargain, sell, give, grant, covenant, or promise the same, their antecessors or they by whom he or they claim the same, have been in the possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof, by the space of one whole year next before the said bargain, covenant, grant, or promise made), upon pain that he that shall make any such bargain, sale, promise, covenant, or

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grant, to forfeit the whole value of the lands, &c., so bargained, sold, promised, covenanted, or granted, contrary to the form of this Act; and the *buyer and taker* thereof, *knowing the same*, to forfeit also the value of the lands, &c., so by him bought or taken as is above said; the one half of the said forfeitures to be to the King, and the other half to the party that will sue for the same in any of the King's Courts of record by action of debt, bill, plaint, or information."

The land in question had belonged to one Lawrence Buchan. He died in 1859, leaving the property in question to one Ann Duncan. The plaintiff in the present action, during the life of Ann Duncan, received the rents of the property, which consisted of a mill and several cottages in Manchester, and accounted for them to her from time to time, making disbursements for rates and insurance, and other similar charges, out of the rents, and charging them and the expenses of collection in the accounts rendered to Ann Duncan, who lived in Scotland upon other property to which she had succeeded upon the death of her brother George in 1865. This property had been left to George Duncan by Lawrence Buchan.

In 1867 Ann Duncan died intestate as to the land in question, but leaving a will as to her personalty and as to the Scotch estate. Since that time down to the present the rents of the land in question have in fact been received by the plaintiff; but, on many occasions, when different persons have informed the plaintiff that they themselves or others on whose behalf they wrote claimed or stated that they believed themselves to be heirs-at-law of Ann Duncan, the plaintiff wrote letters to the effect that the property was safe in his hands for the heir as soon as his title could be proved.

Amongst others, the defendant Lyell having in 1869 intimated that he believed he was the heir of Ann Duncan, received a letter from the plaintiff on the 15th of January, 1869, in which is the following passage:—"I can assure you that, if you are Miss Duncan's heir, you will have no difficulty with me. The rents are all placed in bank as they accrue, and regular accounts kept." In fact the plaintiff paid the rents into a bank to the account of "the executors of A. Duncan," and the receipts for rates and

insurance and outgoings were generally taken in the name of "the executors of Miss Duncan."

In March, 1880, the defendant commenced an action against the plaintiff before Malins, V.C., to recover the property in question, asserting that he was heir-at-law to Ann Duncan, being heir to his father, who died in 1869, and who, as he alleged, was the great grandson of Elizabeth Lyell (born Cunningham), who was a sister of Ann Duncan (born Cunningham), the paternal grandmother of the intestate Ann Duncan. The plaintiff (Kennedy) in affidavits filed in that action set up that Ann Duncan (born Cunningham), the intestate's paternal grandmother, had a brother Andrew, who had a descendant George, still alive, who was the son of Major General John Cunningham. In one of these affidavits used by the plaintiff it was sworn by the deponent, Moncrieff, a writer at Perth, that Major General John Cunningham's father had three sons, George, Lawrence, and John. This affidavit was sworn on the 22nd of May, 1880.

On the 1st of July, 1880, the present defendant discontinued his action; and on the 24th of December, 1880, he entered into the transaction in respect of which the present action is brought on the ground that it was the buying of a pretenced title within the 32 Hen. 8, c. 9, s. 2. The deed of purchase was between Eleanora Bradock, widow, of the first part, Catharine Cunningham, spinster, of the second part, Isabella Cunningham, spinster, of the third part, and the defendant of the fourth part. It recited the death of Ann Duncan intestate as regards the property in question in 1867, "leaving, as is believed, the said Eleanora, Catharine, and Isabella her co-heirs-at-law, who have agreed with the said David Lyell for the conveyance and assignment to him of all their estate and interest in the lands;" and witnessed that, in pursuance of the said agreement and in consideration of 5*s.* then paid by Lyell, they and each of them thereby granted, released, and conveyed to him and his heirs and assigns all their and each of their estate and interest in the lands of or to which Ann Duncan was at the time of her death seised, possessed, or entitled at law or in equity, and to which upon her death the said Eleanora, Catharine, and Isabella became entitled as her co heirs-at-law, and all the right, estate, title, interest, property, possession,

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claim, and demand whatsoever, both at law and in equity, of them and each of them in, to, out of, and upon the said lands and premises." And they also assigned to him all their interest in the rents and profits accrued due since the death of Ann Duncan. The deed also contained a covenant for further assurance.

On the same day,—the 24th of December, 1880,—the defendant gave the plaintiff notice of the deed and its purport, and called upon the plaintiff to deliver up to him possession of the estate and account for the rents and profits now in his hands, and gave notice that in default he would commence legal proceedings, adding the following words,—"I may mention that the aforesaid ladies are the only remaining descendants of George Cunningham, the eldest brother of the late General Cunningham," &c. The George Cunningham so mentioned would be the same person spoken of in Moncrieff's affidavit above referred to, used by the plaintiff, and sworn on the 22nd of May, 1880; and, if that George Cunningham had issue living, their title would be prior to that set up by the defendant in the action which he discontinued on the 6th of July, 1880, before taking the conveyance of December from the three ladies.

On the 4th of January, 1881, the defendant brought a second action, founded on the deed of the 24th of December, 1880 (which action is still pending), in which he alleges that the three conveying parties to that deed are co-heirs of Ann Duncan, and claims that the present plaintiff should be ordered to give him possession of the premises, and that accounts of the rents should be taken, and for a receiver. The present plaintiff, in order to prevent further litigation at the suit of the defendant, brought the present action on the 21st of June, 1881; and since that time both cases have given rise to much litigation upon interlocutory questions as to the right to interrogate and to have discovery of documents.

On the argument before me, both parties largely referred to dicta of the several learned lords and other judges who have had to dispose of the questions raised in those interlocutory proceedings, and I have carefully read the reports of those proceedings; but I can find nothing in any of those dicta, nor any decision, which enables me to decide this case on the ground that it is

either res judicata or even that any strong opinion has been expressed upon the points upon which in my opinion its decision must turn.

The sole question in the case appears to me to be whether the defendant at the time at which he signed the deed of the 24th of December, 1880, incurred by signing it the penalties imposed by s. 2 of 32 Hen. 8, c. 9. The plaintiff contends that he did; the defendant, that since 8 & 9 Vict. c. 106, whatever might have been the case before, no forfeiture can be incurred unless the purchaser knows that he is purchasing, not merely a mere right of entry, with knowledge that the seller has not been in possession for one whole year, but a fictitious title; and that in this case there was no evidence of any such knowledge on the part of the defendant at the time of the purchase.

There can be no doubt that down to 8 & 9 Vict. c. 106, the sale of a right of entry, whether the title sold were good or bad, and where the seller or those under whom he claimed had not been in possession for a whole year, was within the statute, and incurred the forfeiture: see *Goodwin* v. *Butcher* (1); and that the transaction itself was void. The latter point was expressly decided in *Doe* d. *Williams* v. *Evans*. (2) But, even before 8 & 9 Vict. c. 106, in the case of an action or information against the *buyer* of such a right for the penalty of the statute, it was essential that his knowledge of one matter at least should be alleged and proved, viz. that the seller or his predecessor had in fact not been in possession for the required time, viz., one whole year next before the bargain. This appears very clearly from the several reports of the case of *Slywright* v. *Page* (3), which was an information upon the statute, for taking a lease of one not in possession. The first report of it is that of the trial before a Sussex jury, ending in a special verdict, and is in Goldsborough, p. 101. It is clear from that report and the subsequent one at a later stage in Leonard, p. 166, that the law was as stated by Anderson, C.J., "If a man hath not been in possession, and cometh to me and saith that he will make me a lease, if I do not know that he hath not been in possession, I am not within the statute." The concluding words

(1) 2 Mod. 67. (2) 1 C. B. 717.

(3) Goldsb. 101; Leon. 166.

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in the report in Leonard are, "And note, in this case it was holden by the justices that of necessity it ought to be found by the verdict 'that the defendant knowing that the lessor never had been in possession,' which I apprehend clearly means, in possession for the period required by the clause in its excepting words."

This being the state of the law down to 1845, the Act of 8 & 9 Vict. c. 106, was passed in that year, by s. 6 of which rights of entry were made alienable by deed. The effect of this provision upon 32 Hen. 8, c. 9, was much discussed, and partially decided by the Court of Appeal, in the recent case of *Jenkins* v. *Jones* (1); but it was not the case of an action for penalties against the buyer of an alleged pretence title, but only raised the question whether an action brought upon a covenant for title could be maintained, such covenant being contained in a deed the only objection to which was that neither the defendant nor any person through whom he claimed had been in possession of the lands or the profits for one whole year next before the execution of the deed, and that the plaintiff well knew this. The Court of Appeal, after taking time to consider, held that, though the statute of Hen. 8 was not repealed by 8 & 9 Vict. c. 106, yet, since the latter Act, a right or title could no longer be held to be a "pretenced" right merely by reason of non-possession, and that since the later Act a right or title good in fact, that is, not fictitious, is not a "pretenced" title within the former statute simply because it is a right of entry.

This decision obviously leaves open the question whether, in order to make the buyer of a right of entry *liable to the penalty* of 32 Hen. 8, c. 9, it is now sufficient to allege and prove merely that the title he purchases is a bad one, or whether, as it was necessary before to allege and prove his knowledge of the non-possession, so now it is necessary to shew that when he purchased he knew the title to be "pretenced," i.e. fictitious or bad in fact.

I am of opinion that it is necessary for the plaintiff to make this out, and that the onus lies on him to establish it. It would be such an entire departure from the first principles of the law

(1) 9 Q. B. D. 128.

relating to statutes imposing a penalty to hold that, where a statute makes knowledge essential to the incurring of a penalty, evidence of knowledge can be entirely dispensed with, that I think it would be necessary to hold that the statute is repealed so far as the forfeiture by an Act of Parliament is concerned, unless the words "knowing the same" can be applied to the statute consistently with any new statute qualifying the clause of the statute of Hen. 8, by which the forfeiture is imposed.

Mr. Gully maintained that it *was* established in fact that the defendant knew that the title of the co-parceners was fictitious, because in an affidavit made by the defendant on the 9th of June, 1880, before he discontinued his first action, he stated that he had caused certain records referred to in one of the affidavits used on the other side (which were not admissible in evidence) to be searched, and "had been informed and believed" the said records contained no entries tending to shew that Ann Cunningham had any brother Andrew, and yet he now claimed under an Andrew whom he alleged to be the brother of that same Ann.

I am quite unable to see how evidence of this description tends to shew the *knowledge* of the defendant more than six months after that affidavit was made. It is a mere statement of information and belief derived from others, and which may have been entirely displaced by inquiries made between June and December, 1880. Nor can I discover in the whole of the evidence given by the plaintiff any shadow of proof that the defendant had any knowledge of the existence of any heir of Miss Duncan nearer than the co-parceners at the time he took the conveyance in December, 1880. The case now relied upon by the plaintiff before me was not hinted at in any pleading or affidavit until long afterwards; and the plaintiff himself on many occasions in the course of the litigation with different parties expressed an opinion that the intestate had no heirs ex parte paternâ in existence. I think the plaintiff has wholly failed to discharge the onus of shewing knowledge on the part of the defendant that the title of the co-parceners was fictitious by reason of any heir with a better title being still alive on the 24th of December, 1880, the date of the deed.

The other ground upon which it was contended that the defendant knew that the title of the co-parceners was fictitious was, that

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he knew that the plaintiff had been in possession of the property for more than twelve years, and therefore had an indefeasible title by the Statutes of Limitations. As regards this contention, it was admitted by Mr. Gully that, so far as one of the co-parceners (Mrs. Bradock) was concerned, the statute had not run, because six years had not elapsed since the death of her husband (whom she married in 1855, and who died in 1876), and that her right was therefore alive in 1880, when she conveyed to the defendant, by s. 3 of 37 & 38 Vict. c. 57. But, beyond this, it was contended for the defendant that there were other conclusive objections to the application of the Statutes of Limitations. And I am of that opinion. According to the true view of the effect of *Jenkins* v. *Jones* (1), a title is not, I think, to be deemed fictitious or "pretenced" to the knowledge of a buyer in such a case as the present. It appears from the evidence in this case that until recently the plaintiff never affirmatively set up any right in himself adverse to the heir-at-law whenever he might be found. On the contrary, he constantly, to the defendant and to others setting up claims as heir, intimated his determination to hold and account for the property and rents for and to the heir as soon as he should make good his title; and in a letter to the solicitor for one of the claimants, as late as the 29th of October, 1879, when twelve years from Miss Duncan's death on the 5th of November, 1867, were on the point of expiring, in answer to a passage in which the solicitor in question told him that counsel had said, "I cannot believe Mr. Kennedy capable of taking advantage of the statute in his own favour, and to defeat the rights of the parties morally and legally entitled to the property," he answered, "Your counsel is quite right; Miss Duncan's property is quite safe for the person legally entitled to it." I do not find that this letter was communicated to the defendant; nor was there any express or implied promise to the defendant not to avail himself of the Statute of Limitations; nor do I find that the defendant or the co-parceners were induced by any belief that it was impossible that the statute might be set up to delay prosecuting their own claims. But the plaintiff had on more than one occasion used expressions to the defendant as to his determination to manage the property for the heirs after Miss Duncan's death; as in the letters of the

(1) 9 Q. B. D. 128.

15th and 18th of January, 1869, referred to before; and there is a total absence of any assertion of absolute ownership or right inconsistent with the rights of the heirs, and of any personal taking possession of the property, in order to set the statute running as against the heirs.

I have come to the conclusion that the mere fact,—even if it be the fact,—that the right of the co-parceners was statute-barred at the time of the purchase, does not necessarily render it a "pretenced" or fictitious title within the statute of Hen. 8, so as to make the buyer liable to an action for penalties. He only knows that the time has elapsed which will *enable* the party in possession to set up the statute. I apprehend that the party in possession might always refrain from setting up the statute: and it cannot be said therefore that the title is not one that may since 8 & 9 Vict. c. 106 be honestly bought in the hope that no such defence will be raised by the person in possession. On this ground alone I should decline to hold that the plaintiff has made out his case of knowledge on the part of the defendant that the title of the co-parceners was "fictitious" or "pretenced," within the meaning of the judgment in *Jenkins* v. *Jones* (1); for, I do not think that either of those words necessarily includes the case of a title in which for aught that appears the purchaser thoroughly believes, especially in a case where the person in possession has held himself out to the person sued for penalties as being solicitous to be considered as holding only for the heirs, whoever they may be.

But the case was put still higher by the defendant's counsel. They contended that, looking at the evidence relating to the management of the property and the statements of the plaintiff, his possession was in law the possession of the heirs throughout; and that his position was that of a mere manager or bailiff of the estate, first, for Miss Duncan during her life, and, afterwards, for her heirs, who became seised upon her death.

I must presume, and indeed it appears from the plaintiff's evidence, that the property was let to tenants at the time of Miss Duncan's death; and that the plaintiff from that time down to 1880 went on receiving the rents from the tenants and managing the property and charging the disbursements against the rents in

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his accounts precisely in the same way after Miss Duncan's death as before. That being so, I think that the case of *Bushby* v. *Dixon* (1) applies, and shews that immediately upon her death the possession of the tenants became the possession of the heirs of Miss Duncan; and that it is impossible to point to any particular time at which the statute began to run in favour of the plaintiff, at all events before the date of the conveyance of the co-parceners' title to the defendant. Until a period long within twelve years of the deed of December, 1880, he regularly paid the rents into an account not his own, and took receipts for outgoings not in his own name, and disclaimed altogether any intention of dealing with the property as his own. I think, therefore, there was nothing to prevent the possession of the tenants from enuring to the benefit of the heirs-at-law, or to make the taking of the rents and profits (professedly not for his own benefit, but for theirs) a possession in the plaintiff, for the purposes of the Statute of Limitations.

Looking at the whole case, I am of opinion that the contention of the defendant was right, and that the statute of Hen. 8 does not apply, because there is no evidence that the defendant did not bonâ fide believe that the title of the co-parceners was a perfectly good one, and not "pretenced" within the meaning of the statute of Hen. 8 as modified by the statute of Victoria, according to the decision in *Jenkins* v. *Jones* (2); and that there is no evidence that the plaintiff was in possession of the property as against the heirs-at-law whoever they may be, for twelve years before the deed; nor that the possession of the tenants was not the possession of the heirs; nor that the plaintiff was ever in possession of the rents and profits of the property otherwise than as a mere agent or manager up to the date of the deed. Still less that any of these circumstances existed *to the knowledge of the defendant.*

I therefore give judgment for the defendant, with costs.

Judgment for the defendant.

Solicitors for plaintiff: *Rooke & Sons.*

Solicitors for defendant: *J. Balfour Allen.*

(1) 3 B. & C. 298.

(2) 9 Q. B. D. 128.

J. R.

[IN THE COURT OF APPEAL.]

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June 25.

BARLOW AND ANOTHER *v.* TEAL.

Landlord and Tenant—Yearly Tenancy—Half-year's Notice and Six Months' Notice, Distinction between—Agricultural Holdings Act, 1883 (46 & 47 *Vict.* c. 61), *s.* 33.

A tenancy under a written agreement from year to year "until six months' notice shall have been given . . . . in the usual way to determine the tenancy," is not one "where a half-year's notice . . . . is by law necessary" within the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 33, which, therefore, does not apply so as to render a year's notice necessary for the determination of the tenancy.

Judgment of the Queen's Bench Division (ante p. 403) affirmed.

APPEAL by the defendant from the decision of Lord Coleridge, C.J., and Field, J., dismissing an appeal from chambers. The facts of the case are stated in the report of the proceedings before the Queen's Bench Division. (1)

C. Dodd, for the defendant. Six months' notice to quit was insufficient. The plaintiffs were bound to give a year's notice pursuant to the provisions of the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 33. For the plaintiffs it will be contended that the six months mentioned in the written agreement must mean six lunar months; but they really mean six calendar months, and that is a half-year within the meaning of the enactment.

[BRETT, M.R. It was held by Vice-Chancellor Wood, in *Rogers* v. *Dock Co. at Kingston-upon-Hull* (2), that where a tenancy from year to year is determinable upon six months' notice to quit, a notice given six lunar months prior to the expiration of the year is sufficient to determine the tenancy. That was in effect a decision that "six months" means six lunar months.]

In *Doe* v. *Porter* (3) a six months' notice to quit appears to be treated as equivalent to a half-year's notice. The judgment in *Wilkinson* v. *Calvert* (4) may appear to be opposed to the conten-

(1) Ante, p. 403.
(2) 34 L. J. (Ch.) 165.
(3) 3 T. R. 13, at p. 17.
(4) 3 C. P. D. 360.

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tion for the defendant; but that case was decided upon the Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), s. 51, and the provisions of that enactment are not identical with those of the Agricultural Holdings Act, 1883, s. 33.

[BOWEN, L.J. If the judgment in *Wilkinson* v. *Calvert* (1) is right, the argument for the present defendant must be wrong.

BRETT, M.R. If the contract of demise between the parties means six lunar months, the defendant must be in the wrong.]

No doubt in *Right* v. *Darby* (2), a distinction was drawn by Buller, J., between a six months' notice and a half-year's notice; but in that case less than a half-year's notice had been given. And the decision in *Morgan* v. *Davies* (3) shews that a six months' notice to determine a yearly tenancy commencing on one of the ordinary feast-days, means a "customary six months," that is a half-year's notice; here the tenancy was from a feast day, namely, Old Lady Day. In the transaction of the ordinary business of life, as, for instance, in a contract for the purchase of land, a "month" means a calendar month: *Lang* v. *Gale* (4): *Hipwell* v. *Knight.* (5) The same rule holds good in the construction of commercial contracts: *Hart* v. *Middleton.* (6)

Prosser, for the plaintiffs. The word "month" ordinarily means a lunar month: *Reg.* v. *Chawton* (7); *Simpson* v. *Margitson* (8); and in the present case there is nothing to shew that the words "six months" used by the parties in the contract of demise meant calendar months.

C. Dodd did not reply.

BRETT, M.R. In this case it is not necessary to do more than to construe two words in the 33rd section of the Agricultural Holdings (England) Act, 1883; those words are "by law." I am of opinion upon the true construction of the Act that the section applies where there is no express stipulation as to the termination of the tenancy, and that it does not apply where there is an express stipulation. Where there is no express stipulation, the mode of determining the contract of demise is governed by the

(1) 3 C. P. D. 360.
(2) 1 T. R. 159, at p. 163.
(3) 3 C. P. D. 260.
(4) 1 M. & S. 111.
(5) 1 Y. & C. (Ex.) 401, at p. 419.
(6) 2 C. & K. 9, at p. 10.
(7) 1 Q. B. 247.
(8) 11 Q. B. 23.

law and not by the contract entered into between the parties. Whenever a tenancy from year to year is created by implication of law, there must be a half-year's notice to quit; if no stipulation is contained in the demise for the determination of the tenancy, a stipulation would be introduced by law that it should be determined by a half-year's notice. But where the parties to a demise have agreed that a half-year's notice shall be given, that is a stipulation created by the contract entered into between the parties, and it is not a stipulation created by the law. In the present case a six months' notice to quit has been made a term of the demise by the contract and agreement of the parties, and the present case does not fall within the provisions of s. 33. It follows that the contract of tenancy is without those provisions; but that is not a fatal objection to the validity of the notice to quit, for where the landlord and the tenant agree in writing that the section shall not apply, the contract as to the notice to quit is nevertheless good. Wherever there is an express contract as to the time of quitting, or as to the mode of giving notice to quit, the enactment does not apply; the case does not fall within the section. This appeal must be dismissed.

BAGGALLAY, L.J. I am of the same opinion. The 33rd section of the Agricultural Holdings (England) Act, 1883, interferes with the primâ facie right of contract; and I am not disposed to strain the words of the Act of Parliament. A half-year's notice is necessary by law for determining a tenancy from year to year; and the statute was intended to apply, not where a half-year's notice to quit is provided by the contract between the parties, but where it is created by implication of law. Those words "by law" were inserted to distinguish a case like this. I think that the view which we take, is that of Lord Coleridge, C.J., in *Wilkinson* v. *Calvert* (1); he appears to me to rely upon very much the same grounds that we do: he seems to have thought that the Agricultural Holdings Act, 1875, s. 51, applied only, where a half-year's notice to quit was necessary by operation of law. A variety of other cases have been alluded to during the argument; they refer to tenancies which were subject to particular terms. It

(1) 3 C. P. D. 360.

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has been held that "six months" may mean six lunar months in ascertaining the period, within which notice to determine a tenancy from year to year may be given; and it has been held also that a six months' notice to determine a yearly tenancy commencing on one of the ordinary feast days means a "customary six months," that is, from one of the usual quarter-days to the quarter-day next but one following. That was the decision in *Morgan* v. *Davies* (1), to which the present Lord Justice Lindley was a party. But in the present case the parties have by their contract stipulated for a six months' notice; and therefore the mode of determining the tenancy is not regulated "by law" within the meaning of the Agricultural Holdings Act, 1883, s. 33.

BOWEN, L.J. I am of the same opinion, and upon the same grounds. The words of the Agricultural Holdings Act, 1883, s. 33, apply only, where there the parties to a demise have not otherwise provided. It is suggested to me by the Master of the Rolls, and I feel indebted to him for the remark, that the ordinary half-year's notice to determine a tenancy from year to year, when it is created by implication of law, is converted by the statute into a one year's notice to quit.

Appeal dismissed.

Solicitors for plaintiffs: *Bowlings, Foyer, & Hordern.*
Solicitors for defendant: *Pitman & Son.*

(1) 3 C. P. D. 260.

J. E. H.

HALL & CO. *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

1885
June 30.

*Railway Commissioners—Special Case—Power to state—*36 *&* 37 *Vict. c.* 48, *ss.* 15, 26—*Terminal Charges—Stations, Sidings, &c.—Services incidental to the Business of a Carrier—*26 *&* 27 *Vict. c. ccxviii., s.* 51.

On the hearing of an application made under the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 15, the Railway Commissioners have power to state a special case for the opinion of the High Court.

By the London, Brighton, and South Coast Railway Act, 1863 (26 & 27 Vict. c. ccxviii.), s. 51: "The maximum rates of charges to be made by the company for the conveyance of animals and goods, including the tolls for the use of their railways and waggons or trucks and for locomotive power, and every other expense incidental to such conveyance (except a reasonable sum for loading, covering, and unloading the goods at any terminal station of such goods, and for delivery and collection, and any other services incidental to the duty or business of a carrier, where such services or any of them are or is performed by the company), shall not exceed" certain sums prescribed:—

Held, that station accommodation, the use of sidings, weighing, checking, clerkage, watching, and labelling, provided and performed by the company in respect of goods traffic carried by them as carriers, may be, and primâ facie are "services incidental to the duty or business of a carrier" within s. 51; whether they are so in any particular case is a question of fact for the Railway Commissioners to decide, and, if found by them to be so, such services may be the subject of a separate reasonable charge in addition to the rates prescribed.

SPECIAL CASE stated by the Railway Commissioners under s. 26 of the Regulation of Railways Act, 1873, for the opinion of the High Court.

The applicants were lime, cement, slate, and coal merchants, carrying on business at Croydon, Stoat's Nest, Redhill, Horley, and New Wandsworth, in the county of Surrey, and had been in the habit of sending and receiving by the company's railway, lime, cement, coal, and other articles. The distances which the applicants' goods, to which the present application related, were conveyed on the company's railway varied from four miles twelve chains, to twenty-four miles twenty-nine chains.

The maximum rates of charges which the company were authorized to make for goods were fixed by s. 51 of the "London, Brighton, and South Coast Railway (Mitcham and Tooting Lines,

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&c.) Act, 1863" (26 & 27 Vict. c. ccxviii.), which section (so far as material) was as follows:—

"The maximum rates of charges to be made by the company for the conveyance of animals and goods, including the tolls for the use of their railways and waggons or trucks and for locomotive power, and every other expense incidental to such conveyance (except a reasonable sum for loading, covering, and unloading of goods at any terminal station of such goods, and for delivery and collection, and any other services incidental to the duty or business of a carrier, when such services or any of them are or is performed by the company), shall not exceed the following sums; (that is to say,)

"For everything in Class 5, one penny halfpenny per ton per mile.

"For everything in Class 6, twopence per ton per mile.

"For everything in Class 7, threepence per ton per mile.

"For everything in Class 8, fourpence per ton per mile."

At the stations to and from which the applicants' goods were sent, the company had purchased and provided sites for goods-stations and sidings, and, save as hereinafter mentioned, the applicants' goods were received on such goods-stations and sidings.

5. At the said stations the company had constructed buildings and other erections on the said sites, and at the goods-stations and sidings the company's servants rendered services in regard to shunting and marshalling the applicants' goods, both before the transit of the goods had begun, and after it had ended, and the company had incurred and incur great expense in purchasing the said sites and constructing and maintaining the buildings and erections, and paying the salaries and wages of the company's servants who render such services, and at the said stations and sidings the company's servants rendered further services in weighing, checking, clerkage, watching, and labelling of and in connection with the applicants' goods, both before the transit of the goods had begun, and after it had ended, and the company incurred considerable expense in providing such services.

At all the stations mentioned in the application, the company provided and maintained machinery and other appliances for the purpose of loading and unloading goods, and they had purchased

sites for such machinery and appliances and places or portions of the goods-stations were habitually used for loading and unloading, and the company had incurred great expense in purchasing, providing, and maintaining the same. They did not unload any of the traffic referred to in this case. At Battersea, Deptford Wharf, Willow Walk, and Holmwood, but not elsewhere, they loaded the applicants' goods. At Battersea Wharf the company charged, and the applicants paid, ninepence per ton in addition to the rate mentioned in the schedule to the application as for wharfage. The applicants' goods were not landed or deposited on the wharf, but were loaded direct from the barges into the railway trucks. The Commissioners considered that this charge of ninepence included payment for all the services rendered to the applicants at the wharf, and therefore declined to fix any further charge.

At Deptford Wharf the company charged, and the applicants paid, one shilling and sixpence per ton for wharfage, and it was admitted by the company at the hearing of the application that such sum of one shilling and sixpence had been charged and paid in respect of all the services rendered to the applicants at such station.

At Stoat's Nest, Croydon, and Redhill stations the applicants had private sidings of their own into which their traffic was delivered by the railway company. At Stoat's Nest the applicants made no use whatever of the sidings provided for the purposes of goods traffic by the company. At Croydon the company's sidings were used for the purposes of the applicants in a somewhat peculiar manner, which was described in detail in the judgment of the Commissioners on the application (which judgment was to be taken as part of this case), and in respect of which they authorized an addition to the rate of one shilling per truck upon all trucks for which the service was performed. At Redhill the company shunted for the applicants over their own private sidings as well as over certain sidings belonging to the company. For this service they were paid by agreement the sum of one shilling per truck, which sum admittedly covered all the shunting by the company, not only on the private sidings, but on those belonging to themselves.

The applicants filed, on the 10th of April, 1884, an application

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to the Railway Commissioners under the 15th section of the Regulation of Railways Act, 1873, to hear and determine questions and disputes which had arisen between the applicants and the company in respect to terminal charges, and to decide what were reasonable sums to be paid to the company in respect of the same.

The application was set out in Appendix A., which was to be taken as part of this case, and in the same appendix were set out the amended answer of the company, and the amended reply of the applicants, which answer and reply were also to be taken as part of this case.

At the hearing of the application it was contended by the applicants, and denied by the company, that the maximum rates of charges in s. 51 of the company's Act, 26 & 27 Vict. c. ccxviii., included all charges for station accommodation and use of sidings as described in paragraph 5 of this case, and that the expenses of purchasing, constructing, and maintaining such station accommodation and sidings were expenses incidental to conveyance within the meaning of the said section, and that the providing of such station accommodation and use of sidings were not services incidental to the duty or business of a carrier within the meaning of the said 51st section.

12. It was also contended by the applicants, and denied by the company, that the maximum rates of charges in the said 51st section included all charges for the services of weighing, checking, clerkage, watching, and labelling of or in connection with the applicants' goods, and that such services were services incidental to conveyance, and that they were not services incidental to the duty or business of a carrier, within the meaning of the said 51st section.

It was also contended by the company that they were entitled to charge, in addition to the expense of the manual labour in loading and unloading goods, a reasonable sum for expenses and maintenance of the machinery and appliances mentioned in paragraph 6 of this case, and for expense of providing sites for such machinery and appliances, and places and portions of the stations habitually used in loading and unloading.

The company adduced evidence to the effect that in the early

days of railway working there was a class of carriers of goods traffic (of which Pickford & Co. may be taken as a sample) intermediary between the railway companies and the public, who performed and charged for all or most of the services mentioned in paragraph 12 of this case, and also in several cases provided at their own expense the station accommodation needed for the purposes of their traffic. It was proved, however, that this course of dealing never was universal; that where it existed it began to be superseded by the modern practice many years ago, and that Pickford & Co. (the only specific case of which any evidence was given) ceased to act as carriers by railway on their own account, and have for many years been acting as agents only.

The services of weighing, checking, clerkage, watching, and labelling, described in paragraph 5 of this case, were performed by the company for their own protection and in their own interest, but they also enured to an appreciable extent to the benefit of the applicants.

The Commissioners decided that all the expenses of station accommodation and use of sidings described in paragraph 5 were expenses necessarily incurred by the company to enable them to undertake the conveyance of the traffic in question, and that the providing of such accommodation, and the use of sidings were not services incidental to the duty or business of a carrier within the meaning of the said 51st section, and were not any of them services or matters for which the company might lawfully make any charge over and above the maximum rates of charges limited for conveyance by the said 51st section.

The Commissioners further decided that the services of weighing, checking, clerkage, watching, and labelling, as described in paragraph 5, were services incidental to conveyance within the meaning of the said section, and were not services incidental to the duty or business of a carrier within the meaning of the said section, and were not any of them services for which the company might lawfully make any charge over and above the maximum rates of charges limited for conveyance by the said 51st section.

The Commissioners had in a previous case decided that the expenses of loading and unloading included only the expenses of

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manual labour, and of machinery and appliances expressly provided for the purpose of accomplishing the same work as would otherwise be performed by manual labour, and did not include any part of the expense of providing sites for such machinery and appliances, and places or portions of the stations habitually used in loading or unloading, but the Commissioners declined to re-open the question on the present occasion.

Copies of the judgment of the Commissioners in the matter of the said application, and of the order made by them thereon, were set out in Appendix B., which was to be taken as part of this case.

On the motion of the company to state a special case, it was objected by the applicants that the Commissioners had no power to state a special case, any decision by the Commissioners under s. 15 of the Regulation of Railways Act, 1873, being binding on all Courts and in all legal proceedings whatsoever.

The Commissioners decided that under s. 26 of the last-mentioned Act they might, if they thought fit, state a case.

The questions for the opinion of the Court were:—

(1.) Whether the Commissioners had power to state a special case with reference to a decision by them under s. 15 of the Regulation of Railways Act, 1873?

(2.) Whether the statutory maximum rate of charges for the conveyance of goods in the company's Act of Parliament, 26 & 27 Vict. c. ccxviii., included all charges which the company were authorized to make for station accommodation, use of sidings, weighing (when such weighing is not done at the request of the consignor, owner, or consignee of the goods), checking, clerkage, watching, and labelling, or for any, and if any, which of the said matters?

(3.) Whether "loading," and "unloading," in the 51st section of the company's said Act included any, and if any what, portion of station accommodation other than appliances expressly provided to accomplish the same work as would otherwise be performed by manual labour?

(4.) Whether the words "any other service incidental to the duty or business of a carrier," in the 51st section of the said Act, comprised the providing station accommodation or sidings, and

the weighing, checking, clerkage, and labelling of goods, or any, and if any which, of the said matters? (1)

(1) Appendix A contained the application, with particulars of the charges by the company, and an explanation of the terminal services and the sums claimed per ton in respect thereof; the answer of the company and the reply thereto.

Appendix B contained the judgment of the Commissioners, which was as follows:—

SIR FREDERICK PEEL. The applicants carry on business at Croydon, Stoat's Nest, Horley, and Redhill, and have premises at those places adjoining the railway company's stations, and connected by private sidings with the sidings belonging to the company. They deal in coal, cement, bricks, and various builders' materials, and send and receive large quantities of goods by railway. The distance their goods are carried to and from those stations frequently does not exceed ten or fifteen miles, and it appears that in such case, as to some descriptions of traffic, the railway company charge the applicants more than the maximum rate for conveyance, and they state the reason of this to be that they perform in respect of the traffic various terminal services not covered by the rate for conveyance, and for which they are authorized to make charges in addition to the rate, and that the fair and reasonable value of those services amounts to even more than is actually charged in respect of them. The applicants, on the other hand, maintain that the mileage rate for conveyance includes most of these terminal services, and that for such of them as it does not include, the sum added to the rate is more than can reasonably be demanded, and they apply to us under the 15th section of the Act of 1873 to determine each of these questions, and to fix the sums that the company may charge for performing any terminal service for which the company may be authorized to make a charge in addition to the mileage rate. The following are examples of the charges in question:—Coal from Deptford to Croydon, distance, 8 m. 73 ch.; maximum mileage rate, at 1½*d.* per mile per ton, 1*s.* 1½*d.*, actual rate 3*s.*; the balance 1*s.* 10½*d.* being the company's charge for terminals, which, if fully charged for, would, the company say, justify an excess of 4*s.* 8*d.* over the mileage maximum. Chalk from Stoat's Nest to Horley, distance, 11 m. 6 ch., maximum mileage rate, 1*s.* 5*d.*, actual rate, 1*s.* 10*d.*; the extra 5*d.* being for terminals valued by the company at 2*s.* a ton. Oats from Willow Walk to Croydon, distance, 9 m. 57 ch., mileage maximum 1*s.* 2¾*d.*, actual rate, 2*s.* 1*d.* per ton, or a balance of 10¼*d.* for terminals, for which the company claim they would be justified in charging 6*s.* 10*d.* a ton.

The railway company claim, in the first place, the right to make a general station charge, at the rate for stations in the country of 3*d.* per ton for coal, and 6*d.*, 1*s.*, and 1*s.* 6*d.* per ton for the mineral, special, and first to fifth classes of the Clearing House classification, and for stations in London of double these amounts, this general charge to include the services of station staff and officials, the shunting of waggons, and the use of works, buildings, and sidings. They claim also, but only in the event of their not succeeding with their first claim, to charge separately from the mileage rate for loading, covering, clerkage, and other services performed by them at their stations; and, lastly,

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June 5, 8, and 9. *R. E. Webster, Q.C., H. C. Saunders, Q.C., C. C. Macrae*, and *Macdonell*, for the appellant railway company. First.

they allege that, where their lines are connected by private sidings with the applicants' premises, they do more for the applicants than for the general public in taking up and giving out their traffic, and they make, or claim power to make, special charges on that account.

The claim to a general station charge (buildings as well as services) is based upon the view that tolls and rates are payments for the same things, viz., use of a company's railway and rolling stock, the payment being denominated a rate where the carrier is a company, and a toll where he is some other person. In that view, as a toll does not pay for putting the trucks in a position to be loaded, or for loading up goods, so neither would a rate cover a company's expenses prior to the goods starting on their course along a railway, and if a carrier paying toll can charge for the expenses he has to meet besides the toll, why should not a railway company also be at liberty to charge for services which are rendered over and above those for which the rate, in the sense it is here taken in, is the payment. But even a carrier paying tolls would not find it feasible to use a railway, unless the railway had belonging to it sidings or places where the trucks could stand to be loaded or unloaded, and still less could a railway company carrying on its own railway and charging rates receive goods brought to it for carriage, unless there were fit and proper places for goods to be deposited and handled. A company, therefore, whether it takes tolls or rates, cannot dispense with affording some amount of station accommodation in return for taking a toll and à fortiori a rate. But would rates, it is asked, have been fixed at less than tolls, if it was intended that a company should do even more in return for a rate than for a toll. We think there are good grounds why they should have been fixed at less, and that rates and tolls are not at all alike in the considerations which apply to them. A toll is for the case of a person carrying by railway as a private carrier on his own account or for others, and who obtains his means of carrying by hiring from a railway company the use of its railway, and the use of its engines and carriages. A rate is where a company itself conveys, and seeing the obvious advantage and economy to a railway company of being the railway carrier on its own line, Parliament may well have judged it to be quite worth while for a railway company to be content with taking a less sum per ton, and giving a more ample service, in consideration of securing practically the exclusive working of its own line. And when giving power to a railway company to charge as a carrier and imposing restrictions as to amount to be charged, we think it more likely to have been the purpose of Parliament that the whole of the power given should be subject to restrictions than that part only of such power should be regulated. In the Brighton Company's special Act, the maximum charges for the several classes of goods differ by a halfpenny or so per ton per mile, but such nice distinctions, so well calculated to enable the precise cost of carriage for each kind of goods to be ascertained in advance, would be to a large extent worthless and illusory if all station expenses were left out, and

By the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 15, the Commissioners have power to hear and determine any question

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it was intended that in respect of them the maximum charges might be increased ad libitum. Every railway company has had from the first authority to construct stations, as works without which its railway would be useless to it, and it was always evident that it would not be able to exercise its power to convey goods and passengers without making use as well of the stations as of the line. If, therefore, limiting charge clauses were required for one part of the service, they were equally so for the other, and to place no limit upon charges for station expenses seems at variance with the care with which charges or other accounts were limited. Moreover, except for short traffic, the charges for conveyance sanctioned by Parliament are generally found sufficient to cover all expenses, including those for stations. A table of the Brighton Company's scale of charges for coal, including terminals, put in by Mr. Staniforth, their general goods' manager, shews that these charges are in excess of the maximum only where the distances are comparatively short, and that they fall more and more below the full amount the company have power to charge as distance increases, and Mr. Staniforth said that not with coal only, but as a rule throughout, and especially with the traffic of the class carried for the applicants, where his company got up to sixty or seventy miles, they carried it at half the rate of the toll. The initial expenses of traffic not varying, like haulage, in proportion to distance, may equal or exceed the amount which the rate per mile comes to when the distance is short: and the short distance clause, which authorizes a charge as for six miles for any less distance, may not go far enough for all cases, but if the rate per mile for ordinary distances yields a gross sum, sufficient to pay for all expenses, it may, with some reason, be inferred that it was intended to be the charge of all of them. The determination, however, of what a rate includes, depends less upon deductions of this kind than upon the particular terms in which the rate clauses of the company's special Act are expressed. The Act regulating the charges of the Brighton Company is the 26 & 27 Vict. c. ccxviii., and with this Act is incorporated the Railways Clauses Act, 1845, the 86th section of which prohibits railway companies from exceeding the tolls by the special Act authorized to be taken by them. The clause of the special Act which is most material to the present case is the 51st, and is as follows:—"The maximum rates of charges to be made by the company for the conveyance of animals and goods, including the tolls for the use of their railways and waggons or trucks and for locomotive power, and every other expense incidental to such conveyance (except a reasonable sum for loading, covering, and unloading of goods at any terminal station of such goods, and for delivery and collection, and any other services incidental to the duty or business of a carrier where such services or any of them are or is performed by the company) shall not exceed the following sums," &c.

Now in no part of this clause is it possible to find any sanction for charging for general station accommodation, unless it be in the words "delivery and collection, and any other services

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with respect to terminal charges not fixed by Act of Parliament and any decision of the Commissioners under this section shall be

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incidental to the duty or business of a carrier." Even if loading refers to more than mere labour, it would not extend beyond appliances provided expressly to accomplish the same work that is performed by labour, and it is accordingly to the words quoted that counsel for the company appeal to establish their contention. Now the carrier there meant must be one whose business is only a part of the business of conveyance, for otherwise the exception would be conterminous with the thing out of which it is excepted, since as between a general carrier and his customer every service whatever from the moment he receives the goods from the consignor till he delivers them to the consignee is incidental to his business as such carrier, and there can be little doubt that the person meant is a carrier to and from a railway as distinguished from a carrier on the line, and that the clause is framed in reference to the fact that goods carried on a railway have also to be carried to and from the termini of the railway, and that the entire work consists of collecting and delivering and carrying on the line. But as to what is said on behalf of the company that the clause treats carrying on the line as consisting only of the haulage from point to point, and collecting and delivering as including all the rest of the business, and intends the fixed rate of charge to apply only to what a railway company does in the character of a carrier on the line so understood, so that a terminal station and services at such a station are according to this view supplied by a company in a character independent of the railway, viz., that of a carrier who collects and delivers off the railway, and may therefore lawfully be charged for, this is we think a view of the clause which is altogether untenable. The clause states the maximum rates of charge to be made by the company for the conveyance of goods, and conveyance, as there used, cannot be otherwise understood than as taking in the whole course of the company's work as a railway carrier from his acceptance of goods brought to him for the purpose of being forwarded to the moment of delivery at the termination of the journey. It is expressly stated that the rates are the consideration not only for use of the railway and waggons and for locomotive power, but also for every expense incidental to such conveyance, save such expenses as are excepted, and the exception in the clause, viz., loading, covering, and unloading, and collection, and delivery, make it clear that conveyance is used, as we have said, in a very much wider sense than mere haulage from point to point, and that the rate for conveyance includes station expenses, whether for works or for services rendered, unless they are specially excepted. Now as regards expenses in construction and maintenance of works at stations we think this is not an item which is excepted, or for which a separate charge can be made. The circumstance of the Act saying that a reasonable sum may be charged for loading or unloading at any terminal station, and making no mention of a charge for the value of the terminal station itself, creates a strong presumption against its being intended that any such charge should be made. Nor can it be conceded that the exception of delivery and collection,

binding on all Courts and in all legal proceedings whatsoever. By s. 26 they may state a case upon any question which, in the

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and other services incidental to the duty or business of a carrier is in such general terms as to take in station accommodation. It is an exception, so far as it is general, in favour only of services ejusdem generis with collection and delivery, or at most with them as well as with loading and unloading, and if so, we do not see anything in common between these things and the laying out a station. It is suggested that in practice a station is accessory rather to the business of the carrier to and from the railway (i.e., the carrier who carts by road) than to that of the carrier along the railway, and that it is in conducting the road branch of the business that a railway company uses and charges for station accommodation. We think on the contrary that it is the railway part of the business for which station accommodation and services are needed. The carrier to and from a railway has only to take up and put down his load, and he can do all that necessarily belongs to his duty without providing sidings and platforms for loading for railway transit, and without shunting railway waggons into positions where they can be conveniently loaded or made up into trains. The evidence that in the early days of railway working Pickford's and other carriers performed and charged for some terminal services which railway companies now perform proves nothing to the purpose. Those who paid toll had no choice but to perform the services in question. All that they bought from the railway companies was use of railway, use of waggons, and engine power, and anything more required for effective railway carrying had unavoidably to be done by themselves; but it was not done as an incident of their proper business as carriers to and from the railway, but as a consequence of its being railway work not covered by payment of a toll and not performed by the toll-taker. But it is quite otherwise with those who pay rates: they buy all that those who pay tolls buy and much more besides, that is, they buy in addition "everything incidental to conveyance," and as we construe that expression it comprises station accommodation and services; and these are therefore expenses the payment for which is included in the rate, unless expressly excepted, and are not expenses for which the maximum rate can be exceeded. One further observation may be made in terminating the consideration of this part of the case, namely, that although the distinction between the character of the charges which the companies are authorized to make as mere owners of the line, waggons, and engines respectively (which we have called tolls) and those which they are authorized to make for conveyance generally (which we have called rates), is fundamental and is clearly recognised in the Acts which deal with them in separate and essentially different clauses, still the framers of the Acts do not appear to have made a like clear distinction between the terms employed, but have used the word tolls, which is by the interpretation clause of the Act of 1845 explained to include rates and charges, as applicable to both classes of charge indiscriminately.

But the Brighton Company have power under their special Act, where they perform certain services, loading

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opinion of the Commissioners, is a question of law. They had, therefore, power to state this case.

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for instance or covering, to charge a reasonable sum in addition to the mileage rate; and their rates, therefore, do not necessarily include payment for those services. The company load and cover some portion of the applicants' traffic, and their right in such case to an extra charge is not disputed. It is, however, alleged that they claim more than is reasonable, and that in their charge for covering they wrongly include a sum for cost of sheets. For loading they claim a uniform 1*s.* a ton, and the articles out of those in the application which they load are cement at Battersea Wharf, straw at Holmwood, and hair and oats at Willow Walk. The wharf at Battersea is a railway wharf and landing place, and was authorized to be constructed by the West London and Crystal Palace Railway Company by their Acts of 1853 and 1858, but is now part of the Brighton Company's undertaking (23 & 24 Vict. c. clxxi., s. 64). It is a riverside wharf, at which cement and various kinds of rough traffic are unloaded from barges direct into railway trucks, and the transhipment of cement costs the company in wages for labour and superintendence 5½*d.* a ton, and something in addition for cranes. We will not, however, now determine what would be a reasonable sum to allow for this service, because it appears that for all cement brought by water to the wharf to be loaded on the railway the company at present charge to and receive from the applicants the sum of 9*d.* a ton under the name of wharfage. The applicants do not here dispute their liability to this charge, but they allege, and the company deny, that it covers all services rendered, including loading and unloading. The 9*d.* is inclusive of loading if the traffic is coal or coke, and we do not see why because the article loaded out of a barge is cement, and not coal or coke, an addition for loading should be made to the 9*d.* in the case of cement, especially as the expense for labour is less for cement than for coke. At Deptford, where the company have also a railway wharf and docks, they tranship from vessels into trucks at a charge of 1*s.* 6*d.* a ton, and looking at the difference of accommodation at the two wharves, 9*d.* a ton at Battersea as against 1*s.* 6*d.* at Deptford, seems to us a not unequal payment in proportion. If then there is a claim to charge 9*d.* a ton at Deptford besides a loading charge, as we have not that sum as a charge for accommodation now before us, and such a sum merely for use of wharf is a higher charge than we are prepared to recognise without investigation, we think we cannot do otherwise than take a wharfage charge of 9*d.* a ton for the present as applicable also to the loading service, and decline to fix any further charge for the latter as a separate head. The applicants state that they have had cement loaded at Battersea from vans and ask to have a sum fixed for loading of that kind. They state that they unload cement at Croydon at a piecework price of 2*d.* a ton, or 1*s.* 3*d.* per truck load of eight tons, and suggest that loading at Battersea from a van may be done at the same cost. There has been no cement brought to the wharf by cart in the last two years, and it scarcely seems necessary to fix on any particular sum. But we do not think, large as the load

The Court called on

Littler, Q.C. (*Hunter*, with him), to argue this preliminary question.

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of a truck of cement is, that the loading could be done for less than 4*d.* a ton, and we allow that sum. We may here dispose of so much of the application as relates to the charge at Deptford Wharf. The company's actual charge hitherto has been 1*s.* 6*d.* a ton, and the applicants have been willing to be charged that amount for wharfage inclusive of loading. But the company were prepared to maintain that their expenses at Deptford would justify a higher charge than 1*s.* 6*d.*, and then claimed to allocate if necessary out of their rates from Deptford Wharf to Croydon and other places on their line as much as 2*s.* a ton on account of those expenses. A 2*s.* charge was opposed by the applicants, but whether 2*s.* would be too much or not, so long as the charge to the general public was 1*s.* 6*d.*, the charge to the applicants could not be more, nor could more than 1*s.* 6*d.* have any claim to enter among the elements making up the rate. The company, however, agreed in the course of the hearing that the Deptford charge should not count for more than 1*s.* 6*d.* out of the railway rates, and with this sum the applicants were bound by their pleadings to be content.

Willow Walk, where the articles loaded for the applicants are oats and cowhair, is the company's chief goods depôt for London. The total outwards traffic of this depôt (goods of every description) in 1883 was 309,000 tons and inwards 104,000: and the entire cost of the men whose duties are connected directly or indirectly with loading or unloading goods amounted for the same year to 18,347*l.*, which upon the gross tonnage works out to 10·670*d.* per ton. 1*s.* a ton therefore appears to the company to be a reasonable sum as an average charge, and they do not propose to distinguish between one class of goods and another. But some goods are of course more easily handled than others, and the supervision also of loading does not need to be equally close for all descriptions. Mr. Oakley thought oats could be loaded at Willow Walk at a cost of 4*d.* a ton, and we shall fix the sum for the two articles loaded at this place at 6*d.* a ton each; and for hay and straw at Holmwood, a country station, in an agricultural district, at 3*d.* a ton.

The company have power to charge for covering; and on the question of what is to be understood by covering, we think it means not only the labour of unfolding and making fast the sheets over a loaded waggon, but also the use of the sheets. 1*s.* 8*d.* per ton is the company's claim under this head, but as the cost of this service does not depend upon the weight per truck, a tonnage charge is hardly suitable to it, and at all events the only way to apply it would be to graduate it according to load, and to have a higher charge for light loads, decreasing with the increase in the average load per truck. The charging per ton was preferred by Mr. Oakley, who suggested 4*d.* a ton as a fit amount for use of sheets in the case of cement, 7*d.* per ton in the case of hair, and so on. We think it a better course to fix the charge for this service at so much per truck or per sheet, and as to the amount, we have referred to the case of *Coxon* v. *North Eastern Railway Company*, where we found 9*d.* per sheet to be a reasonable sum to allow. That

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The provision of s. 15, that any decision of the Commissioners under that section shall be binding on all Courts is of little use

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was however on the assumption that the sheets used did not make more than one journey a week. In the present case the average distance of the journeys with the applicants' traffic is considerably less than was the distance for Coxon's traffic, and it also appears in evidence that the sheets provided by the Brighton Company make two journeys a week. Under these circumstances we shall fix 6*d.* a sheet as a reasonable sum for use of sheets, and for labour of covering, 3*d.* if one sheet only is used, and 2*d.* each sheet if more than one.

The company claim to charge at the rate of 3*d.* a ton for a group of services which they describe as "weighing, clerkage, watching, and labelling, and as being partly rendered for the benefit of their customers." But a company that carries goods contracts to take proper care of them in their passage, and to make a right delivery of them, and being thus liable, and having also to calculate the price of carriage according to class and tonnage, it finds it necessary in its own interests to check, weigh, label, and watch, and to write out way-bills, invoices, and accounts, and we think all such services are incidental to conveyance, and are covered by the maximum rate.

The applicants use the company's waggons for their traffic, and are supplied from time to time with empty waggons, when the waggons they unload at this or that station are insufficient for the outwards traffic from the same station. The applicants also load and unload in their own sidings or in sidings which they rent from the company, and for this purpose they take the company's waggons into their sidings and shunt and stand them there. In respect of these matters the company have two claims, one of 2*d.* a ton for haulage of empty waggons required for loading, and the other of 4*d.* a ton for the use or occupation of the waggons when taken into the private sidings. The 4*d.* a ton for use of waggons they increase to 6*d.* in the case of Stoat's Nest on account of the greater length of the applicants' sidings at that station, and the 2*d.* for haulage of empties claimed as payable on all the applicants' traffic from Stoat's Nest, Battersea Wharf, and Willow Walk, is demanded also on their traffic from Deptford Wharf, empty waggons having to be sent there, to be loaded, from New Cross distant 1 mile 50 chains. These four claims are those called J, E, H, and K. As regards haulage of empties (J and K), this service arises from the traffic of a station in and out not being evenly balanced. Thus at Stoat's Nest, where the applicants have large limekilns, their traffic for 1883 was 277 waggons in, and 2912 waggons out, and their demand for waggons for outward traffic was only partly met by the other traffic of Stoat's Nest, the traffic of the public at large being almost wholly inwards. Empty trucks have therefore to be supplied to the applicants from other parts of the line, and they are obtained either by taking them off up goods trains, as they pass Stoat's Nest, which are bringing up empties from further down the line, or by fetching them from the nearest depôt. As a rule, the up trains may be relied upon to meet the demand, and to intercept waggons for immediate use, which are on their way for distribution to a depôt more or less distant,

unless s. 15 is excepted from the general provision in s. 26, which no doubt applies to other sections, viz. ss. 6, 11, 12, and 13.

cannot be considered a disadvantage to the company. But unless a company is put to some special expense in this matter of supplying waggons, a rate ought not we think to be increased on account of it, for the use of waggons, for which a rate is payment, involves a delivery of them for use in an ordinary way, and, if it be so, it seems to us that a claim to add 2*d.* a ton on all traffic forwarded from Willow Walk, and Battersea and Deptford wharves, because the company have not return loads to those stations for all the waggons which they send out loaded from them, and a proportion therefore come back empty, is not admissible. The charges which are called E and H are made in respect of the time that waggons loaded or unloaded on private sidings are necessarily out of the company's possession and control, quite apart from any such undue detentions as might give rise to claims for demurrage. They rest upon the assumption that rates, like tolls, are merely for haulage and may be increased when other services than haulage are performed; and the case put for them is that loading by traders off the company's premises involves their having the temporary custody of the company's property; that it is more profitable for a company to have its waggons used under its supervision than away from it; that waggons that go into private sidings do less work than waggons that load or unload in a company's sidings; and that traders who require to use waggons in their own sidings ought to bear any loss incurred through the waggons doing less running work in consequence. Rates, however, as we have already said, differ altogether from tolls, and unless the way a company's waggons are dealt with in private sidings does appear to cause such waggons to earn less than when they do not go out of the company's sidings, we do not think the charges in question ought to be allowed. In this particular case it has been shewn by the evidence produced on the part of the company, that the waggons returned from the applicants' sidings are available for further use, at least as expeditiously as those unloaded by consignees in the company's own premises, and if we take into account the fact that a considerable proportion of these waggons are returned loaded, this traffic so far from being exceptionally costly to the company, would appear, so far as claims E and H are concerned, to be conducted more beneficially for them than the average. While on the subject of these claims for waggons, we may refer in a few words to another claim of the same class called L. This, as set forth in the pleadings, is a claim for detention of waggons in private sidings for a period which though within the prescribed time before demurrage is chargeable, is over and above the time absolutely requisite to load or unload. Like demurrage, however, it is more in the nature of a penalty for misconduct than a terminal charge, and it could not in any view of it form part of a gross rate. It was withdrawn by counsel for the company.

The remaining charges in dispute are those for special services performed for the convenience of the applicants at Croydon, Redhill, and Horley. The company have only one set of rates to Croydon; their charge has always been

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In all cases the decision of the Commissioners on a question of fact is final and conclusive, therefore the special provision in s. 15

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the same whether the goods traffic of that station has been dealt with in their own goods yard or in private sidings. There are two or three firms besides the applicants who have private yards at Croydon Station, and these yards are all on the down side, while the goods yard of the company is on the up side of their railway. The applicants complain of the Croydon rates being in excess of the maximum rates for conveyance, and the company's answer is that they at least are fairly charged more than the maximum because of the special service performed for them at that station, and which the company value at 1s. a ton. The applicants' traffic is chiefly down traffic, and their down traffic comes chiefly by down main line trains. All trucks put off at Croydon by these trains are on arrival at once shunted into the company's long siding or down loop, out of which there is a siding leading to the applicants' yard, and the special service consists in shunting any of those trucks which are for the applicants out of the long siding into the siding to the applicants' yard, or as far as to their junction. The shunting is generally done by an engine from the goods yard, but the engine seldom crosses specially for that purpose: it crosses in conjunction with trains that either stop at Croydon as a terminus, or start from Croydon; and it crosses also to take away to the goods yard all other inwards traffic than the applicants, that has been left by the down trains in the down siding. Trucks consigned to the applicants it puts into their siding, and if the trucks are together they are put in by a single shunt; but if they are mixed with other trucks the operation is not so simple, the trucks having to be sorted out. The trucks, however, are generally able to be sorted before they arrive at Croydon; and through the trains arriving not only marshalled as usual in station order but with the applicants' trucks marshalled together, any difficulty there might be in delivering the applicants' trucks without first taking them across to the goods yard to be picked out is obviated. Now, so far, as between a delivery of trucks to the applicants at their siding and a delivery to them in the company's own goods yard, the latter place being the furthest away and on the other side of four lines of railway, we do not see that the course taken causes the company on the whole any additional trouble or expense. Supposing that course not to be taken, they would still have the same expense of sending the shunting engine from the goods yard to the down side, and the signals and levers to be worked would be the same as at present; the engine would not indeed have the extra shunt, but on the other hand it would have to do the work which it is now saved of hauling the applicants' trucks over to the goods yard; and as to these trucks coming already sorted and being put together, in marshalling the train at the place where it starts from, what is done in that respect is no more than has to be done at some place or other for all traders who have a large traffic by railway, and is done at Croydon without extra charge for traders with a less traffic than the applicants, but still considerable enough for the company to find it convenient to reserve for them a particular part of the goods yard for the special accommodation of

must relate to questions of law. The intention of the legislature was that these questions as to terminal charges should be decided

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their traffic; and if the applicants did not find storage room for their traffic in their own yard, but rented instead a part of the company's yard, there could be no delivery of their trucks without a sorting similar to the work now done for them, so that that work, though done in the most convenient manner for the applicants, can scarcely be considered an addition to the company's ordinary work. But as to traffic for the applicants which is taken to the company's goods yard before being taken to their private siding, there is, we think, a special delivery and extra cost to the company in delivery. Traffic by the up or down local lines or by the up main line goes first to the company's goods yard, and with regard to all such traffic, we think the company if they continue to deliver it into the applicants' siding instead of requiring them to take delivery in the company's goods yard are entitled to charge for this service a sum of 1*s.* a truck. It will of course be understood that this extra charge is applicable only to the up traffic and to so much of the down traffic as would in the ordinary and regular course of business arrive by the local line. No such charge ought to be made on any traffic —no matter how it may in fact arrive —which ought naturally to have come by the main down line.

At Red Hill the company shunt for the applicants over their private sidings as well as over a siding belonging to the company, and are paid 1*s.* a truck by agreement. There is, however, a difference between the applicants and the company as to whether this 1*s.* covers all the shunting, or only the shunting on the private sidings. The company say the latter, and they claim to charge 6*d.* a ton, or to have the power to add that sum to the rate for shunting on the siding which is their own. Considering, however, that the previous agreement between the parties, the one for which the existing one was substituted in 1877, applied to the whole of the sidings, the applicants paying an annual rent for the use of the company's siding and doing all shunting with their own engine, we think it the more probable view that the latter arrangement under which the same work was in future to be done by the company's engine instead of by an engine of the applicants took in, like the earlier one, all the shunting and not one part of it only, and, indeed, counsel for the company admitted no other conclusion could be come to.

The applicants' traffic at Horley is all down traffic, and trucks put into their sidings, which, as at Croydon, are on the down side, have been shunted in by the process known as roping, the engine drawing the truck by a rope instead of being hooked to it directly, and the sum the company claim for this is 4*d.* a ton. It appears, however, that Horley Station is now being altered and that there is no roping at the present time, the applicants drawing trucks in by their own horses, and that it is uncertain whether, after the alterations are completed, the company will again shunt as before. The distance the trucks were roped was very short, and the larger proportion of the traffic appears not to have been roped at all, but unloaded in the company's sidings, the number of trucks so unloaded in the year ending

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in a summary manner by the Commissioners, and that there should be no appeal whatever from their decision on this particular class of case.

LORD COLERIDGE, C.J. I think that it is clear that the Railway Commissioners have a right under the 26th section to state this case. Sect. 15, it is true, enacts that their judgment is to be binding in all Courts upon matters within the purview of that section. Then s. 26 says that they shall, in cases arising under certain sections, and may in all other proceedings if they think fit, state a case. Reading those two sections together it seems to me that the meaning is that there shall be no question at

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the 31st of March, 1884, being 443 out of a total of 603. On the whole we do not see any sufficient ground for making a special allowance for delivery at this station.

The result of these decisions when applied to the charges actually made by the respondents is that these charges are justified in nearly one third of the instances brought before us, and that in nearly two thirds of these instances they turn out to be excessive, there being a few cases which we treat as neutral, no evidence having been offered on either side. Under these circumstances, and having regard to the very great difficulty which there would be in separating the costs properly applicable to the different items, we have found it necessary to make a somewhat arbitrary division, and accordingly will grant to the applicants half their costs. The cost of the shorthand notes ought, we think, to be divided between the parties in the proportion of one third to be paid by the applicants, and two thirds by the respondents, the sum already paid by the applicants for the use of the copies supplied to them being taken into account for this purpose.

MR. COMMISSIONER MILLER. I want to add one word, not with reference to the general subject, but as to the evidence which was adduced with regard to the practice of Messrs. Pickford and some other persons. It is not necessary for the purposes of this judgment, but it may be useful that I should make the remark—it appears to me to be absolutely irrelevant in dealing, as we have in the vast majority of cases to deal, with Acts of Parliament passed in or after the year 1845. Whatever effect that practice might have on the earlier Acts, Parliament must be held, in dealing with an Act such as this one, passed in the year 1863, to have had reference to the practice as it prevailed at the time when the Act was passed. If it be argued that they still continued to employ the old language without variation, that must have arisen from one of two causes: either the promoters of the Act did not think that the difference of circumstances justified any difference of charge, and therefore they did not venture to propose any; or, they did think such difference justified, but Parliament negatived the idea.

[The order of the Commissioners was also set out.]

all raised under the 15th section unless the Railway Commissioners themselves choose to raise it; but if they choose to raise it, they have a general power under the 26th section to state a case for the opinion of the Court.

MANISTY, J. I am of the same opinion. Suppose that the provision which is in s. 26 had followed s. 15 instead of being placed, as it is for a very good reason, in a different part of the Act. Then s. 15 would read thus: The Commissioners shall have power to hear and determine questions in dispute which may arise respecting terminal charges, and any decision of the Commissioners under this section shall be binding on all Courts and in all legal proceedings whatsoever; but if the Commissioners think fit they may state a case for the opinion of the Court. Then no doubt would have arisen; and I do not think that the fact of this provision in s. 26 being placed further on in the Act, because it has reference to many other things in it, makes any difference.

MATHEW, J. The two sections appear to me to be entirely consistent. It is not necessary that one should be made to depend upon the other.

WILLS, J. I think the reason why the provision at the end of s. 15 was put there is evident. The questions to be decided are such as would arise between a number of persons in the same circumstances, and what would be the consequence if such questions could not be decided once for all for all persons whose interests require the matter to be determined? One jury might allow one set of terminal charges and another jury another set, and therefore it was said that the Railway Commissioners should decide the matter, and their decision be conclusive for everyone concerned.

Webster, Q.C., then argued the questions raised in the special case.

Under the statutory provisions in the various Acts of Parliament regulating the rights of the public and the rights of the railway companies, neither trader nor competing railway company got, for the maximum tolls or rates, any right whatever to use the

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stations of the railway company. The stations, which were to be provided only at the option of the railway company when they chose to carry on the business of a carrier, and the use of those stations, and the services summarised in questions 2, 3, and 4 of the case, are "services incidental to the business of a carrier" within the meaning of s. 51 of 26 & 27 Vict. c. ccxviii. Originally the trader might either run his own engine and trucks over the line, or place his goods in trucks on the line, and direct the company to convey them along it. That was the nature of the service intended to be covered by the maximum tolls or rates. The trader had no right to use stations of the company. Speaking generally, the rights of the public over railways are regulated by the public Acts. The Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), which is incorporated with the Brighton Act and all other private railway Acts since 1845, by s. 3 provides that the word "toll" shall include any rate or charge or other payment payable under the special Act for any passenger, animal, carriage, goods, merchandise, articles, matters, or things conveyed on the railway. "Conveyed" there may mean either by a person carrying on the business of a carrier or by the railway company themselves. "The expression 'railway' shall mean the railway and works by the special Act authorized to be constructed." Sect. 16 empowers the company, for the purpose of constructing the railway or the accommodation works to execute the following works, inter alia "stations." But there is no definition of "station" in s. 3, and the only way in which the public could pretend to a right over stations would be by alleging that they come within the words "railway and works by the special Act authorized to be constructed." Then ss. 86 to 92 affect the rights of the public and company respectively. The expression therein "use and benefit of the railway," "convey," "tolls," and "railway," all refer to the right of passing over the railway, and not to the use of stations. Sect. 91, referring to tolls for the conveyance of passengers and goods and for other services over the fraction of a mile, certainly does not mean conveyance as carriers. Sect. 92 enacts that it shall not be lawful for the company to demand or take a greater amount of toll or make any greater charge for the carriage of passengers and goods than they are by this and the special Act

authorized to demand, and upon payment of the tolls from time to time demandable, all companies and persons shall be entitled to use the railway, with engines and carriages properly constructed. The words "toll" and "charge" there evidently refer to the use of the railway and not to any amount which might be taken if the railway carry on a business or provide accommodation which they need not carry on or provide unless they like; for it is optional: *Johnson* v. *Midland Ry. Co.* (1); *In re Oxlade* v. *North Eastern Ry. Co.* (2) Sect. 93 prescribes that a list of all the tolls authorized by the special Act to be taken shall be published on a board; and s. 94, that the length of railway is to be measured and milestones put up; and s. 95, that no tolls shall be demanded or taken for the use of the railway during any time at which the boards and milestones shall not be so set up. It has on those sections been held that the tolls to be so published are the tolls for passing along the railway only: *Garton* v. *Bristol and Exeter Ry. Co.* (3); *Brown* v. *Great Western Ry. Co.* (4) Terminal services could not be calculated on a mileage rate.

It cannot be denied that the company are undoubtedly entitled to make the maximum charges to a customer who has put upon the line by his own siding goods which the company have simply to convey along their line and into another private siding, which might by s. 76 be connected with the railway. Yet it will be contended that if the company for their own purposes put up stations, warehouses, cattle pens, &c., the trader is entitled to use them without extra charge. But the tolls for conveyance are tolls for conveying the goods from the point at which they come on the line to the point where they leave, quite independently of stations, and that is the reason why express words relating to charges for loading and unloading are found in the Acts. It may be done by the company on other premises than their own.

The general legislation gave the trader a right to use the railway and to have his goods conveyed for certain fixed maximum tolls. He got no right to call on the company to load, cover, unload, deliver, or collect for him, or to carry on the business of a carrier. The private Act of Parliament contem-

(1) 4 Ex. 367.
(2) 15 C. B. (N.S.) 680.
(3) 30 L. J. (Q.B.) 273.
(4) 9 Q. B. D. 744.

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plates that those services may or may not be performed, and hence the provisions of s. 51. By ss. 114 to 125 of the 8 Vict. c. 20, provisions were made for supervision over the locomotives and carriages of other persons who came to use the railway. The position of the public was then this: They had power to connect sidings with the line, a right to use the railway with their own engines and carriages, a right to have trucks or engines from the company at a fixed charge, if they chose to let out trucks or engines to a person desiring to carry on the business of a carrier, and, apart from the Act of 1854, there was no power whatever to compel a railway company to carry on the business of a carrier.

But reference to the toll clauses of the private Acts shews the intention of the legislature that the railway company who owned the line of railway should be induced to carry on the business of a carrier by being enabled to put such charges upon persons who could by law have come upon their line and competed with them as carriers as would in effect enable the railway company to carry on the business themselves.

In 1853 the question whether the power reserved to the public by the Railways Clauses Consolidation Act, 1845, s. 92, to use the railway with engines and carriages, upon payment of the mileage tolls included the power of using the stations, arose in the case of *Midland Ry. Co.* v. *Ambergate Co.* (1), before Hatherley, V.C., who in giving judgment advanced strong reasons to the contrary and, although it was unnecessary to decide that point, said: "If it should ever come to be decided it is certainly very doubtful whether the use of the railway on payment of tolls will include the use of the stations."

Under the general Acts the public or a competing railway company are entitled to use the line, but are not entitled to use the stations. The private Act of Parliament with which the Railways Clauses Act is incorporated makes no difference. In it "railways" has the same meaning only as in the general Act, and "conveyance" does not mean carriage as a carrier, but the passing of the goods over the line from one point to another.

There is nothing to shew a permission to the trader to use the stations on payment of the maximum tolls, or compulsion on the

(1) 10 Hare, 359.

company to provide stations upon receipt of the maximum tolls. See ss. 48, 49, and 50.

In s. 51 expenses "incidental to conveyance" may include shunting a train into a siding to allow other trains to pass, or passing a train through intermediate stations which it does not require to use, signalling there, &c., whereas the services intended to be paid for all involve the use of a terminal station, "a reasonable sum for loading, covering, and unloading of goods at any terminal station" may be charged. Those services may be performed on the premises of the trader—in which case the charge would be less—or upon a place provided by the company, viz., a terminal station, and that is to be taken into consideration. The Commissioners conceded that a charge may be made for the use of the company's crane. Then why not for the place on which it stands? So a charge "for delivering and collection" involves a place where the delivery carts may stand. Thus far the charges might be made whether the company were carriers or not. By the expression "the duty or business of a carrier" the legislature did not mean the duty or business of a toll taker or conveyer of goods from the siding of the trader, but that business which the company may carry on if they choose, and incidental to it, there are a number of services which, as carriers, they have to perform. The charges now complained of have been made and acquiesced in for a number of years.

It was never intended that the companies should carry on business at a loss, and if they are not entitled to make a fair charge for station accommodation where they act as carriers they must maintain the full maximum rate for long distances in order to recoup themselves for the loss on the short distances, the result being that the long distance traffic would have to pay for the short.

It is said that many of the services, such as checking, &c., are for the advantage of the company. But, as it is found in the case, they also enure to the benefit of the applicants.

[He referred at length to the special case and the judgment appealed from.]

If *Pegler* v. *Monmouthshire Ry. Co.* (1) is cited for the appli-

(1) 6 H. & N. 644.

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cants, the answer to them is that the special Act of the defendants there contained no such words as those in this Act, and the company was bound to carry as common carriers.

In *Lancashire and Yorkshire Ry. Co.* v. *Gidlow* (2) the words did occur, and an attempt was made to charge for services at the private sidings of the trader not at the stations of the company, and the case was disposed of on its particular facts, as the judgment of Lord Cairns shews. Nothing was done but conveying.

Littler, Q.C. (*Hunter*, with him), for the respondents, Hall & Co. There is a great distinction between the toll clauses proper in the special Acts and the limiting charges clauses. Originally, no doubt, many of the companies only provided the railroad. Some also provided carriages and some haulage power, and the toll clauses were arranged accordingly, and were either road tolls, carriage tolls, or haulage tolls. It might well be that the legislature intended that the companies, when they became carriers and entered into competition with others, should do more for less money.

Maximum tolls were fixed for passengers. But it has never been suggested that an additional sum could be demanded of them for station accommodation, although provided at great expense. Yet the cost of stations cannot be included in a mileage rate, for the use of the smallest station involves no more expense to the passenger than the use of a costly terminal station. If a station is not incidental to the conveyance of goods, it is not incidental to the conveyance of passengers. Apart from the clause in brackets, there could be little doubt that the words in s. 51, "every other expense incidental to such conveyance," included a loading and unloading place. Up to the year 1859 there were Acts of Parliament which are still in force containing no such reservation to the companies as the bracketted clause, and the fact that Parliament often and for years passed Acts without it leads to the inference that the legislature did not mean that extra charges for stations should be made. The history of the legislation throws light on the meaning of the clause. Before 1845 it was almost unusual for any charging clause but the toll clauses to appear in the special Acts, because very few of the

(1) Law Rep. 7 H. L. 517.

railway companies were, up to that time, doing business as carriers. The Monmouthshire Railway Company was an exception. Other companies became carriers voluntarily. Before 1845 the clauses took different forms, and the earliest special Act with any reference to a charge for loading and unloading, was that of the Lancashire and Preston Railway Company (7 Will. 4, c. xxii.), who were amongst the earliest of the carriers. After the usual toll clauses, s. clxiii. empowered the company to make such reasonable charges in addition to the tolls as they might determine upon, and then by s. clxix. they were allowed to make a charge for the expense of loading and unloading in cases of transit for a less distance than four miles. Therefore Parliament recognised the fact that in such short distances there might be more expense than was covered by the tolls, but in all other cases the tolls were sufficient to cover the expense.

In 1844 the Lancaster and Carlisle Railway Act, 7 Vict. c. xxxvii., was passed with a number of toll clauses and a very special provision enabling the company to charge for loading and unloading, "and for the use of stations or other accommodation or services." That was one of the long Acts which led to the Railways Clauses Consolidation Act of 1845, and s. 89, providing that nothing in that Act or the special Act shall charge or make liable the company further or in any other case than where, according to the laws of the realm, common carriers would be liable, leaves them in exactly the position of common carriers. Then whether, as in the case of the Monmouthshire Railway, the company were obliged by their Act to be common carriers, or whether they elected to become so, the moment they held themselves out as common carriers all the incidents of common carriers attached.

By at least the year 1845 the railway companies had become carriers as well as toll-takers. That is evident from 8 & 9 Vict. c. 20, s. 86, enacting that it shall be lawful for the company to use locomotive power and carriages and waggons, and to carry and convey upon the railway all such passengers and goods as shall be offered to them for that purpose, and to make such reasonable charges in respect thereof as they may from time to time determine upon, not exceeding the tolls by the special Act

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authorized to be taken by them. The subsequent sections also negative the supposition that up to that time the companies had been acting exclusively as toll-takers. The rates were fixed with due regard to the nature of the goods to be carried, ex. gr., the rate for coal, lime, &c., which require no covering, is lower than the rate for feathers, &c., which shews that the risk of injury from exposure is included in the higher rate.

Sect. 90 of 8 & 9 Vict. c. 20, gives express power to vary tolls.

So long ago as 1846 railway companies had in their Acts a clause identical with s. 51 of the Brighton Company's Act (26 & 27 Vict. c. ccxviii.). If the exception in that clause "except a reasonable sum for loading, covering, and unloading of goods at any terminal station of such goods, and for delivery and collection, and any other services incidental to the duty or business of a carrier—" had stopped there, the finding of ground for carts to stand on to unload alongside the rails might be "incidental to conveyance."

[WILLS, J. Is covering goods a service?]

Yes; the manual act of covering might be a service, but is probably rather "incidental to conveyance." Loading, unloading, and covering are all manual acts which the carrier does for the advantage of the customer. With some kinds of goods, such as coal, lime, &c., the loading and unloading is done by the consignor and consignee. As to the higher class of goods, which may or may not be loaded and unloaded by the consignor and consignee, it may have been considered fair that extra remuneration should be paid to the railway company. But there is no word justifying a charge for accommodation. "Warehouse" in s. 16 means simply a place for the storage of goods after their transit. But "warehousing" through failure of the consignee to take away the goods within a reasonable time, may clearly be charged for, and the charge is as for demurrage.

Passing over a large number of Acts in which the clauses appear in a variety of forms, it will be found that in three successive sessions of Parliament before that in which the Brighton Act passed, the analogous clause was introduced into several Railway Acts without the exception; thus, the company may take, in

addition to the tolls specified, "(a reasonable sum for the delivery and collection of goods and other services incidental to the business of a carrier, when such services respectively shall be performed by the company otherwise than upon the premises of the railway)": 22 & 23 Vict. c. lxxxiv., s. xlvi. (the Hereford, Hay, and Brecon Railway Act, 1859). In 22 & 23 Vict. c. xciv., s. xxxvi. (the Cowes and Newport Railway Act, 1859), the maximum rate includes the tolls for the use of the railway, "and every other expense incidendal to such conveyance." So in 22 & 23 Vict. c. xcv., s. xl. (Ringwood, Christchurch, and Bournemouth Railway Act, 1859), and in 22 & 23 Vict. c. xcvi., s. xlix. Then, in 22 & 23 Vict. c. civ., the exception was "(except a reasonable sum for the delivery or collection of goods, when such services or any of them are performed by the company otherwise than on the premises of the company, and except a reasonable sum for warehousing)." So where the service of collection or delivery was on their own premises, the company must perform it without extra charge. Then, in 22 & 23 Vict. c. cv., s. xli. (the Berks and Hants Extension Railway Act, 1859), the exception is of a reasonable sum for delivery and collection, and any other accommodation *or* services incidental to the business or duty of a carrier, &c. But in 22 & 23 Vict. c. cx., s. lxvi. (the Lancashire and Yorkshire and East Lancashire Railways Amalgamation Act, 1859), the word "accommodation" is not used, and in c. cxiv., s. xvi. (the Silverdale and Newcastle Railway Act, 1859), there is no exception clause at all, nor in c. cxvii., s. xxx. (the Epping Railways Act, 1859), nor in c. cxxv. (the Mid-Sussex and Midhurst Junction Railway Act, 1859), s. xliv., nor in c. cxxviii. (the Kensington Station and North and South London Junction Railway Act, 1859), s. liii., but s. lv. provides that nothing in the Act shall prevent the company from demanding a "reasonable sum for the delivery and collection of goods beyond the premises of the company, and for other services incidental to the business of a carrier, when such services shall be undertaken by the company beyond the premises of the company."

Next session there was a change in the clause, and by 23 & 24 Vict. c. cxxii., s. xlvi. (Disley and Hayfield Railway Act, 1860), the

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company might demand a reasonable sum for collection and delivery, &c., performed "elsewhere than within the premises of the company," and in c. ix. (the Inverness and Aberdeen Junction Railway Act, 1860), s. lxiii., might charge for the use of any warehouse or other similar accommodation, and a further reasonable sum for collecting or delivering and for other services incidental to the business of a carrier where such services shall be performed by the company otherwise than upon the premises of the railway.

In the next year no similar clauses were introduced, but in one solitary Act, viz., 24 & 25 Vict. c. cxxix. (Downpatrick and Newry Railway Act, 1861), s. xliv., there is a clause, which would justify the whole contention of the appellants, enabling the company to make a reasonable terminal charge for the "accommodation afforded and service rendered by them other than the actual conveyance thereof along the railways," but even in that case fixes a maximum rate of charge. So that even in that one case where the legislature provides for terminal charge it limits the maximum. That clause was not repeated. In 1864 27 & 28 Vict. c. 121 (the Railways Construction Facilities Act, 1864), s. 49, enacts that the proprietors of the railway may make the charges specified in a schedule which contains tables and regulations, of which No. 8 provides that in addition to the charges in Table III. "a reasonable charge is to be payable for the loading, covering, and unloading of goods at any station, being a terminal station, in respect of such goods, and for delivery and collection and any other services incidental to the duty or business of a carrier," &c. Those words are nearly the same as in the Brighton Act; the other services are ejusdem generis with unloading and covering. By 31 & 32 Vict. c. 119, s. 17, "where any charge shall have been made by a company in respect of the conveyance of goods over their railway," the company shall on application render an account distinguishing how much is for conveyance and how much for loading and unloading, covering, collection, delivering, and for other expenses, &c.

Lastly, by 40 & 41 Vict. c. xci., s. xxiii., the London and North Western Railway obtained power to charge for warehousing, &c., except in case of coal delivered into private sidings. The com-

pany, although already having a clause like the one in question, evidently thought it necessary to apply to Parliament for power to charge for the use of their land.

Station accommodation is not a service incidental to the business of a carrier: *Lancashire and Yorkshire Ry. Co.* v. *Gidlow* (1), and haulage, shunting, and marshalling were held by the Railway Commissioners, upon the authority of that clause, to be service incidental to conveyance only: *Dunkirk Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (2); and even where there is express power to make terminal charges it does not enable the company to charge for the mere use of sidings for shunting or unloading so long as there is no delay in unloading: *Chatterley Iron Co.* v. *North Staffordshire Ry. Co.* (3) The ordinary station services are a part of the services primâ facie included in the contract for conveyance: *Howard* v. *Midland Ry. Co.* (4); and see per Sir Frederick Peel in *Isle of Wight (Newport Junction) Ry. Co.* v. *Isle of Wight Ry. Co.* (5)

A company must for their own purposes check goods and take accounts to discriminate and charge for the carriage of goods. Booking, way-bills, notices of arrival, &c., are all incidental to conveyance: see *Bailey* v. *London, Chatham, and Dover Ry. Co.* (6)

Webster, Q.C., replied.

Cur. adv. vult.

June 30. The judgment of Mathew and Wills, JJ., was delivered by

WILLS, J. This is a case stated for the opinion of the Queen's Bench Division by the Railway Commissioners upon an application made to them under the 15th section of the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), in respect of a dispute that had arisen between Messrs. Hall, who are lime, cement, slate and coal merchants, and the London, Brighton, and South Coast Railway Company, as to certain terminal charges made by the railway company upon the carriage by them of goods for and at the request of Messrs. Hall.

(1) Law Rep. 7 H. L. 517.
(2) 2 Nev. & Mac. 402.
(3) 3 Nev. & Mac. 238.
(4) 3 Nev. & Mac. 253.
(5) 4 Nev. & Mac. 128, at p. 133.
(6) 2 Nev. & Mac. 99.

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Wills, J.

The first question submitted to us is whether the Commissioners have power in respect of such a litigation to state a case. We are of opinion that they have power to do so.

By s. 26 they are *required* in all proceedings before them, under certain specified sections (of which s. 15 is not one) at the instance of any party to the proceedings to state a case for the opinion of the High Court. In all other proceedings before them under that Act they *may* do so if they think fit. It is suggested, however, that a provision at the end of s. 15 that "any decision of the Commissioners under this section shall be binding on all Courts and in all legal proceedings whatever" deprives them of that power. We think not. We see no good reason—certainly none has been suggested—why in the class of cases arising under s. 15, as to which points of law of great difficulty and importance were very likely to arise, the Commissioners shall have been precluded from availing themselves of the assistance of the High Court. We think there is no grammatical necessity for so construing the provisions in question, and that full efficacy will be given to the words, if we hold that they mean that in all other proceedings between the same parties, as, for instance, in an action to recover overcharges, the same question arising in respect of the same state of facts shall be concluded by the decision of the Commissioners.

The second, third, and fourth of the questions put to us by the Commissioners ask in substance one—namely, whether station accommodation, the use of sidings, weighing, checking, clerkage, watching, and labelling (being matters performed by the company in respect of goods traffic carried by them as carriers) fall within the category of "expenses incidental to conveyance" or of "services incidental to the duty or business of a carrier" in s. 51 of the company's Act of 1863 (26 & 27 Vict. c. 218). By s. 48 of the Act in question the company "may demand and take for the use of their railways and for the supply of carriages, waggons, or trucks, any tolls not exceeding the following (that is to say), First, in respect of passengers conveyed upon their railways or any part thereof as follows: for every person twopence per mile, and if conveyed in or upon a carriage provided by the company, an additional sum of one halfpenny per mile. Secondly, certain

specified sums in respect of animals conveyed upon their railways. Thirdly, in respect of goods and other things conveyed upon their railways or any part thereof as follows: Class 5, for all cement, coal, lime, slates, per ton per mile one penny farthing, and if conveyed in a carriage provided by the company, an additional sum per mile of one farthing."

By s. 49: "The company may demand for the use of engines for drawing or propelling carriages on their railways any sum not exceeding one penny per mile for each passenger or animal and for each ton of goods or other articles." By s. 50: "The maximum rates of charge to be made by the company for the conveyance of passengers along their railways including the tolls for the use of the railway and of carriages and for locomotive power and every other expense incidental to such conveyance (except Government duty) shall not exceed the following sums (that is to say) for every passenger conveyed in a first-class carriage by an express or fast train twopence halfpenny per mile" and other charges in respect of other classes and trains. By s. 51: "The maximum rates of charges to be made by the company for the conveyance of animals and goods, including the tolls for the use of their railways waggons or trucks and for locomotive power, and every other expense incidental to such conveyance (except a reasonable sum for loading, covering, and unloading the goods at any terminal station of such goods, and for delivery and collection, and any other services incidental to the duty or business of a carrier, where such services or any of them are or is performed by the company), shall not exceed the following sums (that is to say) for everything in class 5 one penny halfpenny per ton per mile, &c." By s. 52 (inter alia), "The following provisions and regulations shall be applicable to the fixing of such tolls or charges (that is to say) for goods animals or persons conveyed on their railways for a less distance than six miles the company may demand tolls and charges as for six miles. . . . No station is to be considered a terminal station in regard to any goods conveyed on the railways of the company unless such goods have been received thereat direct from the consignor of such traffic or are directed to be delivered thereat to the consignee." The Railways Clauses Consolidation Act, 1845, is

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incorporated with the company's Act. It is to be observed at the outset that neither by the Railways Clauses Consolidation Act, 1845, nor by any part of the legislation specifically applicable to the London, Brighton, and South Coast Railway Company, are the company under any obligation to carry either passengers or goods. By s. 86 of the Act of 1845, power is given to the company to provide their own engines, carriages, and trucks, and to become carriers, but the railway is treated as a highway, which, upon payment of the authorized tolls, any person or company is to be entitled to use with his or their own engines, or carriages, or trucks (s. 92), subject only to proper regulations as to times of departure, arrival, speed, and the like, to be made by the company (s. 108), and it is worthy of remark that the authority to make regulations under which most of those now in force on the various railways throughout England, by which the comfort and freedom from annoyance of passengers may be secured, have been made, is conferred in words which have no specific reference to the carriages of the company, but which speak of carriages "using the railway," and are equally applicable to the vehicles of persons paying tolls, using their own trains, and themselves being carriers of passengers under s. 92. This notion of the railway being a highway for the common use of the public, in the same sense that an ordinary highway is so, was the starting point of English railway legislation. It is deeply engrained in it. In the early days of railways it was acted upon at least occasionally, and in respect of goods traffic, and although it enters but slightly into modern railway practice, no proper understanding of a good deal of our railway legislation, and pre-eminently of clauses relating to tolls or charges, can be arrived at, unless it is firmly grasped and steadily kept in view. Three states of things were from this point of view to be expected and to be provided for by legislation. The company might be merely the owners of a highway and toll-takers for the use of it by other people with their own carriages and locomotives. That state of things would be worked out by the railway company possessing the mere line of railway from end to end, and by the persons making use of it, buying or renting contiguous land whereon to keep their rolling stock, and have their offices,

availing themselves of the powers of s. 76 of the Act of 1845, and getting on to the railway by means of sidings connected with the railway.

A second state of things, as we know from the evidence in this case to which by the consent of the parties we are at liberty to refer, prevailed extensively for many years after the railway system was in full operation, and for some years at least after the passing of the Act of 1845. The railway company provided the line and provided the engines and trucks, but they were not carriers. The large warehouses and sheds wherein goods were received, sorted, loaded, covered, checked, weighed, and labelled, and trucks or carriages marshalled and prepared for convenient removal to their various places of destination—a corresponding work was done in respect of goods arriving from a distance—the staff of clerks, bookkeepers, porters, workmen, and horses necessary for these operations were all provided and maintained at the expense of the carrier, and no portion of it fell upon the company. The company, on the other hand, as owners of the rolling stock, for the use of which as well of their railways they received payment, provided whatever accommodation they needed in order to keep in convenient proximity to the places where the carrier had his depôts the necessary supply of rolling stock.

The third state of things which might exist simultaneously with the second, or might be the one prevailing exclusively on a particular line, existed when the company were themselves the carriers of the goods, and when as carriers they provided the accommodation and performed the services above described.

The company might thus be: 1, toll-takers and neither conveyers nor carriers; 2, conveyers but not carriers; 3, carriers. It would naturally be expected that in the first case they would have powers to take tolls, and tolls only, and that in the second they would have power to make charges, which should include tolls and charges for the use of rolling stock, and it would seem reasonable enough that (inasmuch as they would probably have much greater facilities for keeping and using their rolling stock to advantage and with economy than any other person could have) where they provided both trucks and locomotives as well as took tolls the maximum charge should be lower than the aggregate of

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the three separate charges which they might make for, 1, use of railways; 2, use of carriages; 3, locomotive power.

It would seem natural also to expect that where the company were carriers, inasmuch as they performed the identical services which they perform under the second head, and others besides, they should be allowed to charge the same sums as they might charge when falling under the second category, plus those which are appropriate to the extra services and liabilities which fall upon them when they undertake the duties and business of a carrier. It seems to us that this is precisely what has been done by the clauses under consideration. Under ss. 48 and 49 powers are given to take tolls for the use of the railway as a highway and to make further charges for the use of carriages or for locomotive power where either or both of them are provided by the company. By ss. 50 and 51 it is provided that if the company with their exceptional facilities, supply highway, carriages, and power, in other words convey, the charges shall be less than the aggregate of the three separate charges. By s. 51 it is provided that where the company not merely convey goods, as they would for the carrier who had his own station accommodation and staff, but, being themselves the carriers, in addition to providing highway, vehicles, and power, perform such services as are incidental to the duty or business of a carrier, services of the kind already described, they shall be at liberty to make in addition to the charges proper to highway, rolling stock, or power, in other words, to conveyance, a reasonable charge for the totally different and often much more costly services they render in the totally different capacity of carriers.

Such a construction is reasonable as well as consistent with the history of the railway system. The contention of the applicants appears to us singularly unreasonable. It was proved before the Railway Commissioners, and is not disputed, that the actual cost to the company of the accommodation and services, which, for many years after the railway system was very largely developed, and all the principal lines in the kingdom were at work, were on some of the most important railways in England provided by independent carriers, and did not fall upon the railway company, amounted to 1*s.* 5*d.* per ton; and it is admitted that even with

the help of the six-mile clause, the company, if the contention of the applicants is correct, would, in the case of traffic carried not more than six miles, have to carry goods coming under class 5 at a dead loss, which may be approximately stated as 8*d.* per ton for station services alone, besides getting nothing for the use of railway and trucks and for providing power.

The charges of and incidental to "conveyance," as we have explained that phrase, are properly measured by the mile of distance travelled over. The terminal services of station accommodation, loading, watching checking, and the like, have no common measure with the distance run, and are the same, whether that distance be two or two hundred miles.

It was argued that, with respect to passengers, no such extra charges are permitted to the company where they act as carriers, and that therefore they ought not to be allowed in respect of goods. The answer is two-fold. We believe that, as a matter of railway history, the companies were always from the first the only carriers of passengers on their lines, and the terminal services rendered to passengers are so unlike those rendered to goods, that there is no analogy between the two cases. Passengers are not collected, delivered, covered, loaded, weighed, checked, nor, in railway phraseology, "handled" as goods are.

It was objected also that as a general rule of construction an "exception" ought to be something which, but for the exception, would fall within the primary proposition, and that therefore "conveyance" in s. 51 must be something which comprehends loading, delivery, and the like. As a strict grammatical construction this proposition is undeniable. The departure, however, from strict construction required by the view we take is not a violent one. We read the exception as equivalent to "but in cases where the company are the carriers they shall be allowed to make reasonable charges for the specified services and such others as are incidental to the duty and business of a carrier and are actually performed by the company."

It was said that by the interpretation clause of the Act of 1845 "railway" includes the works authorized by the special Act, and that therefore the toll for the "use of the railway" includes the use of the stations. The definition, however, is not intended to

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be of universal application, but only where the context does not require a different interpretation. We think it very clearly appears that this is an instance in which the context does so require.

There is very little direct authority upon the questions submitted to us. There is none against the view we take, and it is undoubtedly in accordance with the opinion expressed by Vice-Chancellor Wood in *Midland Ry. Co.* v. *Ambergate Ry. Co.* (1); *Gidlow's Case* in the House of Lords (2) is certainly no authority to the contrary. It was cited as a decision that certain services analogous to some of those now under consideration were not "incidental to the business of a carrier," but that is not so. There was a finding by an arbitrator, as a matter of fact, that certain specified matters were such as a company providing rolling stock usually performs, but that is all. There is no decision and no expression of opinion which throws any light upon the questions raised in this case.

Our answer, therefore, is that the providing of station accommodation, and work of the general nature indicated to us by the Railway Commissioners appear to us to be capable of falling under the definition of "services incidental to the duty or business of a carrier," and primâ facie to do so. Whether in any particular case they do so, or to what extent they do so, must be a question of fact for the Commissioners, the line we should draw being that whatever is necessary for "conveyance" in the sense in which we have defined it—being all capable of being measured by reference to the distance travelled—is covered by the mileage rate. Whatever is properly incidental, not to conveyance, but to the performance of the duty and business of a carrier, and in other respects falls within the exception of s. 51, that is to say, is actually performed and is done at a terminal station, may be made the subject of a separate reasonable charge.

Our judgment is therefore for the appellants, with costs.

MANISTY, J. If I had had an opportunity of carefully considering the judgment which has just been delivered by my brother Wills, I am not prepared to say that I should not, with

(1) 10 Hare, 359-370. (2) Law Rep. 7 H. L. 517.

perhaps one or two trifling exceptions, have adopted it and made no further observation upon the case, but the pressure of various matters of great importance has been such that I have not had an opportunity of so carefully considering that judgment as I should otherwise certainly have done. I ought to say the pressure upon both of us, and undoubtedly on my brother Wills, because he has been good enough to take the trouble of writing that judgment which has just been delivered; but there are one or two comparatively minor points, and they may be of some importance, and therefore I intend to make a few observations in addition to those which have been made by my Brother Wills. In the conclusion I entirely and absolutely agree. The cardinal point in the case is, what is the true and proper construction of the 51st section of the special Act? That may be viewed in two ways. It may be considered in reference to the usage and well-known custom and practice with regard to railway companies, and with regard to carriers, and it may be construed, and, I think, might easily be construed without reference to that usage and practice. There is a point—one, perhaps, more of form than of substance—in which I do not quite adopt the language of my learned Brothers. In my opinion the 51st section should be read and construed as containing three parts—not two. The first is this: "The maximum rates of charges to be made by the company for the conveyance of animals and goods including"—a curious expression—"the tolls for the use of their railways and waggons or trucks and their locomotive power and every other expense incidental to"—what?—"incidental to such conveyance." And that word, to my mind, has a clear and well-defined meaning, such as my Brother Wills, in his judgment, has alluded to. I think that word "conveyance," if I may say so, with the greatest respect to the Commissioners, has not been quite considered,—at all events, effect has not been given to it to the extent which it deserves, because when we come to consider all the other clauses with reference to railway business proper, as distinguished from carrier's business, I think the language in all the sections points to the two things as being perfectly separate and distinct. So much for the first part. Then we come to the exception, and I agree with my learned Brothers that strictly the grammatical

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construction and use of that word "except" would be extraordinary, because an exception is an exception out of something larger, something to be taken out of—*ex.* Therefore it would run, The maximum rates and charges shall not exceed so-and-so, except a reasonable sum for loading, covering, and unloading. Well, if you except it in that sense you take it out of it. It would be—you may charge these maximum rates except that you must deduct something, and that, clearly and plainly, is not the meaning. It is an exception in the sense, I think, attributed to it by my Brothers, of an addition. It is not an exception properly so called, it is an addition. Now here, I think, I draw a somewhat different line from that of my learned Brothers. "Except a reasonable sum"—for what?—"for loading, covering, and unloading the goods at any terminal station of such goods." Now there is clearly a charge permitted and authorized for that which may or may not be carrier's business. Whether they are carriers or not, it seems to me that they have a right over and above that maximum rate of charge to charge if they do the work; they have a right to charge a reasonable sum for loading, covering, and unloading at the terminal station whether they are carriers or not. And then we come to the third part of the section: "for delivery and collection and any other services incidental to the duty and business of a carrier." There the legislature have distinctly stated that they consider delivery and collection as a service of a carrier, and so it is. Therefore it seems to me that whether the company are carriers or not, they have by that which I may call the second part of the section, the right to charge for the loading, covering, and unloading, if they perform those services. And then we come to the most important part of the whole section: "and for delivery and collection and any other services incidental to the duty or business of a carrier, where such services or any of them are or is performed by the company." Well, this company does perform the duty or business of a carrier, and that includes delivery and collection. How can they collect the mass of goods which are collected from day to day without having either a goods station, as it is usually called, or a building—I care not by what name it is called? To separate the parts of the station which are used for collecting, handling, and arranging and

dealing with the goods from the station seems to me something almost inconceivable; it could not be done, and I place great reliance upon the word "collection." It does not mean merely sending carts about, and each cart, having collected the goods, coming on to the line, but the company collect them at a place where they can arrange, handle, and sort them, and do all the other matters which are necessary before they are loaded, and therefore the legislature in this case, whatever may have been done in other cases—and a number of other special Acts were called to our attention, but I do not take them into consideration at all, I look at this Act,—clearly contemplated the case of a railway company being both conveyers upon the railway and also being carriers, doing all services, and having all the necessary arrangements incident to the business of carriers. And if that view is adopted, see what becomes of the contention on the one side and on the other. I am reading from the case. "At the hearing of the application it was contended by the applicants and denied by the company that the maximum rates of charges in the said 51st section included all charges for the services of weighing, checking, clerkage, watching, and labelling of or in connection with the applicants' goods and that such services were services incidental to conveyance and that they were not services incidental to the duty or business of a carrier." It is contended by the company that they were entitled to charge an addition for loading and unloading, and for maintenance of machinery and appliances, and so on. So that there is the contention on the one side and on the other, and the moment a proper construction of the 51st section is arrived at it seems to me that the contention of the applicants instantly fails, because it gives no effect at all to that important exception, as it is called, which includes the two sets of charges which may be made. It is to be a reasonable sum. How could the legislature ever prescribe for every single station on this line, for every terminal station, what was a proper charge? It could only be done by limiting it, as it has done, to "a reasonable sum," and it is for the Railway Commissioners to say what is a reasonable sum under the circumstances at each terminal station. "No station is to be considered as a terminal station in regard to any goods conveyed on the railways of the

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company unless such goods have been received thereat direct from the consignor of such traffic or are directed to be delivered thereat." Therefore, terminal stations are recognised, and terminal charges are recognised distinctly, and it seems to me that there we might leave the case, because if that construction is adopted which we hold to be the true construction, I do not think there is any substantial difference between the judgment of my learned Brothers and myself upon that; but I think it is clearer if the section is divided into three parts instead of two, and consider that the exception includes not only matters which may be done if the railway company are carriers, but also the business of a carrier. After having decided that, I am not at all sure that we might not simply say that is the principle on which the Commissioners are to act, and that is the true construction of the section.

But there are some other small matters which perhaps may be mentioned. We are to answer several questions; therefore let us see what the decision of the Commissioners is:—[The learned judge read it from the case.] Suppose for a moment that the railway company did not carry on the business of a carrier, and that they are not bound to do it. Assume that they did not do it, is it to be said that if they did the matters which are mentioned in the 51st section, such as loading, covering, unloading, and so on, they are not entitled to charge for them? The Act says that they are. They may charge a reasonable sum. Of course the Commissioners have great experience of these cases, and to some extent it seems odd that we should have to interfere with and, it may be, control the decision of the Commissioners, but the legislature has given them a right to state a case upon all the matters which, in their opinion, are questions of law, whether they are or are not.

The Commissioners say: "The services of weighing, checking, clerkage, watching, and labelling described in paragraph 5 of this case are performed by the company for their own protection and in their own interest but they also enure to an appreciable extent to the benefit of the applicants." It seems to me that if the Commissioners will keep steadily in view the line which we have drawn between conveyance and the other matters mentioned in

the exception in the 51st section, there will be no difficulty at all. It is only through not drawing that line and strictly adhering to it that this question has arisen; and it is the only way I can account for the doubt, if I may say so, which the Commissioners seem to have entertained.

Many clauses in the general Act of 1845 were drawn to our attention. I do not propose to go through them; but several of them were read—the 86th, 87th, 88th, 89th, 90th, 91st, 92nd, and 93rd sections were specially relied upon on behalf of the company, and they no doubt have a very great bearing on this question; but s. 93 seems to me to be quite sufficient of itself to decide the whole matter as to whether or not the view taken by the Commissioners is the right view. Sect. 93 is in these words: "A list of all the tolls"—it is "tolls" throughout—"authorized by the special Act to be taken and which shall be exacted by the company shall be published by the same being painted upon one toll board or more in distinct black letters on a white ground or white letters on a black ground or by the same being printed in legible characters on paper affixed to such board and by such board being exhibited in some conspicuous place on the stations or places where such tolls shall be made payable." Well, now, if those charges come within the toll charges, and what we call rates for conveyance, it would be absolutely impossible to comply with the 93rd section; but that section has been a subject matter of decisions, and it has been decided that the word "tolls" in that section does not include charges made by a company when they are carriers. The cases that I refer to are *Garton* v. *Bristol and Exeter Co.* (1) and *Scottish North Eastern Ry. Co.* v. *Anderson.* (2) That seems to me to shew that the view we take is the correct view; that the two sets of charges—tolls, and charges as carriers—are two separate and distinct things throughout the whole Act, and as far as I can make out, throughout all the Acts. I have looked through the Act of 1868 also, and I do not find anything whatever to shew that the view I am now taking of the 51st section is incorrect. It is said that the interpretation clause, s. 2, of the Act of 1845, shews what is meant by the word "toll." "The word 'toll' shall

(1) 30 L. J. (Q.B.) 273, at p. 293. (2) 1 Court Sess. Cas. 3rd Series, 1056.

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include any rate or charge or other payment payable under the special Act for any passenger, animal, carriage, goods, merchandise, articles, matters or things conveyed on the railway." It is only the conveyance, and having regard to s. 93, no doubt the legislature thought it right to limit the charge for tolls properly so called, but they could not specify and fix a reasonable charge for all the charges made as carriers. The thing was impossible; and therefore, bearing in mind the two characters in which this company acts, it seems to me that the construction we put upon the 51st section will enable the Commissioners to decide the matters in difference between the parties, and to give a reasonable charge for all those matters which we think are incidental to the duty—mind, the duty and business of carriers, as well as those other matters which I think may be charged for, whether they are carriers or not, namely, to repeat it once more, the loading, covering, and unloading, as distinguished from the business of carriers.

As to the questions put to us by the Commissioners, I do not think we can answer them categorically. The first question of course we can answer—whether they have power to state a special case under s. 15. We are agreed that they have the power to state a case. (2.) "Whether the statutory maximum rate of charges for the conveyance of goods in the company's Act of Parliament 26 & 27 Vict. c. ccxviii., includes all charges which the company are authorized to make for station accommodation, use of sidings, weighing (when such weighing is not done at the request of the consignor, owner, or consignee of the goods), checking, clerkage, watching, and labelling or for any, and if any, which, of the said matters." It seems to me that we must leave that to the Commissioners. They have to ascertain what is done within the exception, and to allow a reasonable charge for it; but we have decided what we think comes within that exception. Therefore, I think, we cannot categorically answer every one of those questions. The Commissioners must adopt our construction of that section and allow a reasonable charge for what is done by the company as carriers, including loading, covering, and unloading. The third question is: "Whether 'loading' and 'unloading' in the 51st section of the company's said Act include any and if any what portion of station accommo-

dation other than appliances expressly provided to accomplish the same work as would otherwise be performed by manual labour." There again, I think "loading" and "unloading" include, no doubt, everything that is necessary for loading and unloading, but I certainly am of opinion that they must give much more effect to the latter part of the 51st section, as to the duty and business of a carrier, which clearly includes delivery and collection, because it says "and any other." Therefore they must apply that section in the way that we think it ought to be applied.

Then the last question is: "Whether the words 'any other service incidental to the duty or business of a carrier' in the 51st section of the said Act comprise the providing station accommodation or sidings and the weighing, checking, clerkage, and labelling of goods, or any, and if any, which, of the said matters." That question, I think, we may answer in the affirmative: "Any other service incidental to the duty or business of a carrier," does comprise providing such station accommodation and such sidings, and such weighing, checkage and labelling as is incidental to the duty which they undertake, of collecting and dealing with the goods as carriers. I do not think we can answer the questions put to us by the Railway Commissioners more specifically than that.

Macdonell. I do not gather exactly from your Lordships' observations whether in your judgment you think that providing the station itself is a terminal service?

MANISTY, J. Certainly. I have said that in my opinion—and I am not sorry that you mention it again—some goods station is indispensable to carry on the business of a carrier. The railway company could not do it without.

Hunter asked for leave to appeal. Special leave is necessary. It is under the 45th section of the Judicature Act.

MANISTY, J. I have some doubts about it; but if we have the power to give leave you may have it.

Macdonell referred to the provisions in s. 26 of the Act of 1873, that the Court may "remit the matter to the Commissioners with

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the opinion of the Court thereon or may make such other order in relation to the matter and may make any such order as to costs as to the Court may seem fit, and all such orders shall be final and conclusive on all parties."

MANISTY, J. We reverse the decision of the Railway Commissioners giving judgment for the applicants, and remit it back with our opinion; and I think we ought to give the costs of this case to the company.

Macdonell. Supposing that your Lordships have power to grant leave to appeal; would you grant it upon this condition, that the appellant should be at liberty to refer to the evidence in *Kempson* v. *Great Western Ry Co.*, as has been done in this Court? (1)

MANISTY, J. There is quite sufficient evidence in this case to shew what the practice was.

WILLS, J. It will make no difference; but this judgment does not intend to refer to the evidence in *Kempson's Case.*

Solicitors for appellants: *Norton, Rose, Norton, & Co.*
Solicitors for respondents: *Neish & Howell.*

(1) *The Queen* v. *Kempson.* A rule nisi for a prohibition was also argued on the 9th of June, and evidence taken before the Commissioners as to the original business of railway companies was referred to by Sir Henry James, A.G.

J. R.

[IN THE COURT OF APPEAL.]

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SERRAO *v.* NOEL.

Damages—Estoppel—Injunction—Res Judicata—Second Action for same Cause of Action—Prayer for "further or other Relief"—Chancery Amendment Act, 1858 (21 & 22 *Vict. c.* 27), *s.* 2—*Judicature Act*, 1873, *s.* 24, *sub-s.* 7.

In March, 1881, the plaintiff handed to one Bird, a broker, shares in a mining company, with a transfer signed (a blank being left for the name of the transferee), for the purpose of sale. Bird died; and it was then discovered that he had, without the knowledge or authority of the plaintiff, lodged the shares with the defendant's firm as security for an advance. Having received notice from the company that they were about to register the shares in the name of the defendant, the plaintiff commenced an action in the Chancery Division of the High Court to restrain the defendant's firm and the company from parting with the shares or registering the defendant as transferee,—concluding with the usual prayer for "such further or other relief as the nature of the case might require."

On the 23rd of February, 1882, the defendants in that action consented to an order for the delivery up of the shares to the plaintiff forthwith. The order directed that, "upon delivery of the deed or form of transfer and the securities representing the same, and upon payment of costs to the plaintiff and the mining company, all proceedings in the said Chancery action should be stayed."

The shares were not delivered up to the plaintiff until the 28th of April, 1882, when they were sold at a considerable loss.

In an action against the defendant in the Queen's Bench Division to recover damages for this detention, the jury found that the plaintiff did not authorize Bird to pledge the shares for his own debt, or lend them to him for that purpose:—

Held, that the plaintiff was estopped by the consent order made in the Chancery action on the 23rd of February, 1882, from recovering in this action damages for such detention, and that the defendant was not responsible for the detention of the shares by the mining company after the order had been made in the suit in the Chancery Division.

THIS action was brought to recover damages for the detention of fifteen shares in the Richmond Consolidated Mining Company.

The plaintiff, Mr. Paolo Serrao, was a foreign merchant carrying on business in London; and the defendant was a stockbroker and a member of the firm of Foster, Braithwaite, & Co., London. According to the plaintiff's case, he had purchased the fifteen shares prior to the 17th of March, 1881, and on that day he handed them to his broker, one W. R. Bird, to sell and realise for him. He then handed to Bird the certificate and transfer

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signed, but with a blank for the name of the transferee. On the 31st of March, 1881, Bird was found dead (from poison) in his bed, and a dispute arose as to the shares. The company gave the plaintiff notice that they should claim to register the defendant, Noel, as the transferee. This the plaintiff opposed. It then appeared that Bird had, on the 18th of March, 1881, deposited these shares (along with others) with the defendant's firm as security, and had obtained from them an advance of 100*l.* upon them. The plaintiff thereupon, on the 3rd of April, 1881, commenced an action in the Chancery Division of the High Court to restrain the defendant and the company from parting with his shares or registering Noel as the transferee, and for a return of the shares; and he prayed, as usual, "such further or other relief as the nature of the case might require."

This suit continued pending until the 23rd of February, 1882, when the defendants, who up to that time had kept the shares, consented to a judgment against them, and an order was made to deliver up the shares on that day; but the shares were not handed over to the plaintiff till the 28th of April. After waiting some few days the plaintiff sold the shares for 118*l.* 2*s.* 6*d.*, and four months later, viz. on the 25th of August, he issued a fresh writ in the Queen's Bench Division against Noel to recover damages for the detention.

The defendant pleaded by way of estoppel the previous consent order of the Chancery Division.

The Richmond Consolidated Mining Company, in their defence in the Chancery Division, after stating the circumstances, expressed themselves willing to submit to the directions of the Court on payment of their costs, which by the consent order the present defendant was ordered to pay.

At the trial before Grove, J., the learned judge left the following questions to the jury:—1. Did Serrao expressly or by his acts and conduct authorize Bird to pledge the shares for a debt of his (Bird's) own? 2. Did he hold Bird out as having such authority? 3. Did the plaintiff lend Bird the shares to use them for his own purposes? The jury answered all these questions in the negative, and found a verdict for the plaintiff for 140*l.*, the agreed amount of the depreciation in the shares.

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The question as to the effect of the consent order of the 23rd of February, 1882, was reserved, and was argued before Grove, J., on the 7th of February, 1885, by *Murphy, Q.C.*, and *Stanley Boulter*, for the plaintiff, and by *C. Russell, Q.C.*, *Lumley Smith, Q.C.*, and *Reginald Hughes*, for the defendant.

The following authorities were referred to:—For the plaintiff, *Swaine* v. *Great Northern Ry. Co.* (1); *Mitchell* v. *Darley Main Colliery Co.* (2); *Brunsden* v. *Humphrey* (3); and s. 2 of the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27): for the defendant, *Catton* v. *Wyld* (4); *Davenport* v. *Rylands* (5); *Betts* v. *Neilson* (6); *Fritz* v. *Hobson* (7); and s. 24, sub-s. 7 of the Judicature Act, 1873.

Cur. adv. vult.

Feb. 21, 1885. GROVE, J., after stating the facts, as above, delivered judgment:—

In giving judgment on this case, it will be convenient to separate the claim for damages into two heads, viz. first, Is the plaintiff entitled to damages for the detention of the share certificates from the date of the consent order, February 23rd, 1882, to April 28th, the date of their delivery? As to this, the only contention for the defendant was that the shares were in the hands of the Richmond Consolidated Mining Co., to whom the defendant had delivered them for registration in his name as the owner of the shares, and which company, the defendant consenting, were by the terms of the order of the 23rd of February then to deliver them up to the plaintiff.

I am of opinion that any detention by the Richmond Consolidated Mining Co. was really a detention by the defendant, he having, by delivering the share certificates and deed of transfer filled in with his own name as transferee, for registration, and by not giving that company any order for delivery of them up to the plaintiff, caused the detention. The Richmond Consolidated Mining Co., in their defence in the Chancery Division, after

(1) 4 D. J. & S. 211.
(2) 14 Q. B. D. 125.
(3) 11 Q. B. D. 712; 14 Q. B. D. 141.
(4) 32 Beav. 268.
(5) Law Rep. 1 Eq. 302.
(6) Law Rep. 3 Ch. 429; 5 H. L. 1.
(7) 14 Ch. D 542, at p. 557.

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stating the circumstances, expressed themselves willing to submit to the directions of the Court on payment of their costs, which by the consent order the present defendant was ordered to pay. The damages for this detention for two months and five days were not separated by the jury from the residue of the 140*l.* agreed upon; and it was agreed on the argument before me on the point reserved that such damages, i.e. what, if any, was the depreciation in the value of the shares during this period, should, to avoid a new trial, be referred. The parties have subsequently agreed that such depreciation amounts to 22*l.* 10*s.*; and I give judgment for the plaintiff in respect of this detention after the order of the 23rd of February, 1882, with damages 22*l.* 10*s.*, and costs.

With regard to the other question, viz. whether the plaintiff is entitled to damages for the detention up to the date of the consent order, viz. February 23rd, 1882 (117*l.* 10*s.*), the question is more difficult, and involves two considerations,—first, Is the plaintiff estopped, by the order that, "upon delivery of the deed or form of transfer and the securities representing the same, and upon such payment of costs to the plaintiff and the said (Richmond Consolidated Mining) company as therein mentioned, all proceedings in the said Chancery action should be stayed." The documents were delivered, as before stated, on the 28th of April, 1882, and the costs mentioned in the order were paid on or before the 29th of July, 1882. The contention on the part of the defendant was, that, as in the Chancery action there was, in addition to the specific claims for an injunction to restrain the company from registering and the defendant from assigning, transferring, or dealing with the shares, and for the share documents to be delivered up to the plaintiff, a general claim for "such further or other relief as the nature of the case may require," the Court of Chancery has power under these general words to deal with any damages accruing from the time of detention until the order, and it must be assumed from none being given that none were found, and that this amounts to an estoppel or res judicata, and that the plaintiff cannot recover for any damages prior to the date of such order; and, secondly, that the consent order was a settlement of the action up to its date, and that it included any question of damages, or, in other words, that, in consideration of such

settlement, the plaintiff had waived or foregone any claim to damages.

That the Court of Chancery has power, under Lord Cairns' Act (21 & 22 Vict. c. 27, s. 2), to award damages, and that that could be done by the Court under the general claim for relief, was urged for the defendant, and was not contested for the plaintiff: the case of *Cotton* v. *Wyld* (1) and other cases cited by Mr. Russell appeared clearly to establish the proposition. Prior to the Judicature Act (36 & 37 Vict. c. 66) these damages were given in lieu of an injunction, but subsequently independently of it. But the cases seem also to establish that the Court is not compelled and will not necessarily enter on the question, and may leave it alone, or leave the party to bring an action for the damages: see *Swaine* v. *Great Northern Ry. Co.* (2), and *Fritz* v *Hobson.* (3)

Another question was argued before me, viz. whether damages in cases of detinue could be given beyond the date of the writ or the commencement of an action. The authorities on this question are somewhat conflicting. In the case of *Leader* v. *Rhys* (4), Byles, J., held that damages are not recoverable in an action of detinue beyond the date of the writ: and such, I believe, was the usual practice at nisi prius. But, in *Williams* v. *Archer* (5), the Court of Exchequer Chamber held that, in detinue for railway scrip which had been delivered up to the plaintiff after action, the plaintiff was entitled to the difference in value between the time of demand and that of delivery to the plaintiff under a judge's order. In the case of *Sharston* v. *Wray* (6), Hawkins and Smith, JJ., differed on this question. The judgments in *Mitchell* v. *Darley Main Colliery Co.* (7) and *Brunsden* v. *Humphrey* (8) have also some bearing ont his point. But, as I have come to a conclusion in this case on other grounds, it is not requisite that I should decide it on this occasion.

It appears to me that the consent order in Chancery is not

(1) 32 Beav. 266.
(2) 4 D. J. & S. 211.
(3) 14 Ch. D. 542, 557.
(4) 2 F. & F. 399.
(5) 5 C. B. 318.
(6) Not reported.
(7) 14 Q. B. D. 125.
(8) 14 Q. B. D. 141.

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an estoppel in this case. The Court was not asked to decide and was not obliged to decide, either under Lord Cairns' Act or under s. 24, sub-s. 7, of the Judicature Act, 1873, and did not give any decision on the question of damages. The consent order or judgment, if it may be so called, though it is only an order to stay proceedings, does not touch upon or decide any question of damages. There is certainly no estoppel by record, no finding or entry of a finding, no issue raised or determined on the question; nor can I see that a matter can be said to be res judicata when there has been no adjudication, no judgment.

I am therefore of opinion that the defendant has failed upon his statement of defence so far as it relates to estoppel or res judicata.

The terms "such further or other relief as the nature of the case may require," are so wide and vague that matters might be included in them which the parties never thought of at the time, or may extend to matters possibly not discovered, and which might go far beyond the question specifically raised, and not in any way determined by the judgment, if there had been one.

The question of waiver by the plaintiff, or settlement of all claims by the consent order of the 23rd of February, is more difficult; but I have come to the conclusion, though not without doubt, that there has been no abandonment by the plaintiff of his claim to damages. There was no evidence that they were discussed between the parties. The real and expressed object of the suit was, to get re-delivery of the shares; and no terms were inserted in the consent order that it should be in settlement of all claims.

It is true that, in the bill of costs of the plaintiff's solicitor, the term "settle" is used in reference to the Chancery action: but, even supposing the plaintiff to be bound, which I do not think he was, by a casual expression used possibly for brevity sake in his solicitor's bill of costs, settling the action might well mean settling the Chancery action such as it expressly was, and not settling any possible claim which might have been adjudicated on under the general terms "such further or other relief as the nature of the

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case may require." It does not appear to have been in fact contemplated by the parties; and no terms are inserted shewing that it was contemplated. I am therefore of opinion that, the whole delay having been caused by the wrongful acts of the defendant, the plaintiff is entitled to recover the sum of 117*l.* 10*s.* for the detention anterior to the order of the 23rd of February, 1882, making, with the sum of 22*l.* 10*s.* previously mentioned, the sum of 140*l.*, the agreed total depreciation, and for which I give judgment for the plaintiff, with costs.

Judgment for the plaintiff.

J. S.

The defendant appealed.

June 29, 30. *Charles Russell, Q.C.*, and *Lumley Smith, Q.C.* (*Reginald Hughes* with them), for the defendant. The claim in this action is part of the same cause of action as that for which the plaintiff brought his action in the Chancery Division for the return of the shares, and which was settled by an order by consent under which the defendant handed back the shares and paid the costs.

[BOWEN, L.J., referred to *Brunsden* v. *Humphrey* (1).]

There were two separate and distinct causes of action in that case. That is not the present case where the cause of action is the same as it was in the former action. The damages in respect of loss by the fall in value of the shares, which are sought to be recovered in the present action, could have been recovered in the former action in the Chancery Division under Lord Cairns' Act (21 & 22 Vict. c. 27), s. 2, under the claim there for further or other relief: *Catton* v. *Wyld* (2). Under the prayer for general relief contained in a bill of complaint in a suit in the Court of Chancery the plaintiff might obtain relief for a subject of complaint not stated or charged in the bill: *Hennet* v. *Luard* (3). It has been held that since the coming into operation of the Supreme Court of Judicature Acts, 1873, 1875, where specific performance is refused in the Chancery Division on the ground of mistake by the defendant, so that under the old practice a bill for specific

(1) 14 Q. B. D. 141. (2) 32 Beav. 266.
(3) 12 Beav. 479.

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performance would have been dismissed without prejudice to an action, the Court ought to proceed to consider the question of damages: *Tamplin* v. *James*. (1) It is submitted that this rule of practice must be extended to every kind of action, which can be brought in the Chancery Division. The respective rights of the plaintiff and of the defendant became a res judicata in the action in the Chancery Division, and the rule laid down by Willes, J., in *Nelson* v. *Couch* (2), applies, namely, that "where the cause of action is the same, and the plaintiff has had an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter action."

[BOWEN, L.J. It was pointed out in *Brunsden* v. *Humphrey* (3), that *Nelson* v. *Couch* (4) only established that the maxim "Nemo debet bis vexari" cannot apply where in the first action the plaintiff had no opportunity of satisfying his claim.]

The decision in *Brunsden* v. *Humphrey* (5) proceeded upon the ground, that the plaintiff in that case was injured in two distinct rights; it is, therefore, clearly distinguishable from the present case, where the plaintiff has been injured in only one right. Moreover, the judgment of the Court of Appeal in that case was not unanimous.

Murphy, Q.C. (*Stanley Boulter* with him), for the plaintiff.

[BRETT, M.R. In respect of one cause of action there cannot be separate remedies; is not the plaintiff suing for the same cause of action as he sued for in the action in the Chancery Division?]

It must be admitted for the plaintiff that under the provisions of 21 & 22 Vict. c. 27, s. 2, and the Supreme Court of Judicature Act, 1873, s. 24, sub-s. 7, the plaintiff might have obtained in the action in the Chancery Division the relief which he now seeks: nevertheless his causes of action are distinct and separate. The continuing of a trespass from day to day is considered in law a several trespass on each day, just as the removing of goods wrongfully taken at first, from one place to another, is held to be

(1) 15 Ch. D. 215, and see per Brett, L.J., at p. 221.
(2) 15 C. B. (N.S.) 99, at p. 108.
(3) 14 Q. B. D. 141, at p. 151.
(4) 15 C. B. (N.S.) 99.
(5) 14 Q. B. D. 141.

a several trespass at each place: *Earl of Manchester* v. *Vale.* (1) The wrongful continuance of a building upon another person's land gives to him separate causes of action; and he may maintain one action for the erection of the building, and a subsequent action for its continuance: *Holmes* v. *Wilson.* (2) The repetition of any trespass upon another's land gives rise to a new cause of action: *Bowyer* v. *Cook.* (3) The plaintiff's cause of action both in the suit in the Chancery Division and in the present suit is substantially in detinue; and the authorities cited for the plaintiff as to action for trespass to land equally apply to actions of detinue; for detinue will lie for injury to goods, wherever trespass will lie for injury to land.

[BRETT, M.R. The judgments of the majority of the Court of Appeal in *Brunsden* v. *Humphrey* (4) do not help the argument for the plaintiff, until it has been established that he has distinct causes of action.

BOWEN, L.J. In the action in the Chancery Division the Court might have given full relief by way of damages.]

That circumstance does not prevent the plaintiff from maintaining the present action. At all events, the plaintiff is entitled to recover the sum of 22*l.* 10*s.* for the subsequent detention of the shares.

Lumley Smith, Q.C., in reply.

BRETT, M.R. It is unnecessary now to determine whether there is a fresh cause of action for every day upon which goods are detained, and whether separate actions of detinue can be maintained for each day's detention of them. This is a suit which might have been brought in the Court of Chancery, at least after Lord Cairns' Act, otherwise called the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), s. 2; in one suit there might have been a decree for restitution of the shares and for damages for the detention of them; both remedies might have been obtained. Now there is no Court of Chancery. Grove, J., seems to have supposed inadvertently that the Court of Chancery still exists being

(1) 1 Wms. Saund. 20, ed. 1871.
(2) 10 A. & E. 503.
(3) 4 C. B. 236.
(4) 14 Q. B. D. 141.

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represented by the Chancery Division: it is true that there are two divisions, the Queen's Bench Division and the Chancery Division; but they are divisions of one Court, and that Court administers one law. The former action was brought in the Chancery Division of the High Court, and the present claim might have been maintained in that action. The plaintiff might have been entitled to several remedies, but they could have been all combined and made available in one action: how can the rule apply that where there are several causes of action several actions may be brought, and that a person entitled to several causes of action cannot be prevented from bringing several actions except by depriving him of, or making him pay costs, if he has acted vexatiously or oppressively? (1) Even before the Supreme Court of Judicature Acts, 1873, 1875, and still more now, no more actions than one can be brought for the same cause of action; and I am of opinion that there is but one cause of action in the present case. Where separate rights have been infringed, separate actions may be maintained, because the infringement of separate rights gives rise to separate causes of action: this was elaborately shewn in *Brunsden* v. *Humphrey* (2): that was a case in which the majority of the Court of Appeal thought that separate rights had been infringed.

It has been urged for the plaintiff that, at all events, the sum of 22*l.* 10*s.* for detention subsequent to the order of the Chancery Division in the former actions is recoverable by him; but after the making of that order the mining company was no longer the agent of the defendant; the order was made against the company: the shares were kept back by the company on its own account and not by the defendant; the remedy is against the company, for there has been no disobedience by the defendant. I think that judgment must be entered for the defendant, and I am of opinion that the defendant must have the costs of the cause, and that the plaintiff must have the costs of the issues upon which he has succeeded. The defendant is to have the costs of this appeal.

(1) See *Brunsden* v. *Humphrey*, 14 Q. B. D. 141, per Bowen, L.J., at p. 151.

(2) 14 Q. B. D. 141.

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BAGGALLAY, L.J. I also am of opinion that the defendant is entitled to judgment. This is an appeal from the judgment of Grove, J., and the grounds of the appeal come to this, that a former action has been tried between the same parties, and that an order of the Court made by consent in that former action is a bar to the present action. During the argument for the defendant, reliance was placed upon Lord Cairns' Act (21 & 22 Vict. c. 27), s. 2. I do not agree with the contention of the defendant's counsel as to the effect of this statute; but every remedy necessary for doing complete justice in an action in any division of the High Court is provided by the Supreme Court of Judicature Act, 1873, s. 24, sub-s. 7. The order, upon which the defendant relies, was made in the course of proceedings in the Chancery Division; every kind of relief could have been given in the Chancery Division; application for the relief now sought ought to have been made in that action, and it would have been successful if such a claim as the present could, under any circumstances, be upheld.

BOWEN, L.J. I too am of opinion that the defendant is entitled to judgment. The principle is, that where there is but one cause of action, damages must be assessed once for all. The plaintiff relies upon a certain cause of action; was this cause of action capable of being litigated in the suit in the Chancery Division? If that had been an action of detinue at common law, the jury in their assessment could have included, not only damages for the original wrongful detention, but also damages for the detention until the shares should be re-delivered: damages might have been assessed once for all. The suit in the Chancery Division was an application to the High Court of Justice for all kinds of relief, in order that the rights of the parties might be adjusted. As soon as the writ was issued and the claim delivered, the Court was empowered to do what was right between the parties. It may be said that the plaintiff did not claim damages in the suit in the Chancery Division. I am not sure that he did; the primary object of the action was that it should be a proceeding to obtain the re-delivery of the shares, and perhaps it did not occur to the

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plaintiff to make it clear that he intended to include a claim for damages; but if an application had been made, the Court would have amended the claim, so as to enable the plaintiff to claim damages, and therefore damages not only could have, but also would have, been assessed at the time of the trial in the Chancery Division. In the present case there was a re-delivery of the shares made upon an arrangement arrived at in the course of the suit; the cause of action now litigated is the detention of the shares; that cause of action was litigated in the action in the Chancery Division, and therefore the two actions are in respect of the same cause.

Judgment reversed. (1)

Solicitor for plaintiff: *M. Watson Thomas.*

Solicitors for defendant: *Hughes, Masterman, & Co.*

(1) The Chancery Amendment Act, 1858, otherwise called Lord Cairns' Act (21 & 22 Vict. c. 27), mentioned in the case above reported, was repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), as from the 24th of October, 1883.

J. E. H.

[IN THE COURT OF APPEAL.]

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May 1.

HERMAN *v.* JEUCHNER.

Illegality—Contract—Bail in Criminal Case—Indemnity of Surety—Deposit of Money with Surety—Action to recover Money deposited.

A contract is illegal, whereby a defendant in a criminal case, who has been ordered to find bail for his good behaviour during a specified period, deposits money with his surety upon the terms that the money is to be retained by the surety during the specified period for his own protection against the defendant's default, and at the expiration of that period is to be returned; and no action by the defendant in the criminal case will lie to recover back the money deposited with the surety either before or after the expiration of the specified period, although the defendant in the criminal case has not committed any default, and although the surety has not been compelled to pay the amount for which he has become bound.

Wilson v. *Strugnell* (7 Q. B. D. 548) as to this point overruled.

ACTION to recover the sum of 49*l.*

The plaintiff had been convicted of keeping a disorderly house, and had been ordered to find two sureties in 50*l.* each for his good behaviour for two years. Being unable to find more than one surety, the plaintiff was imprisoned in default. He then desired the defendant to become surety for him, but the defendant refused, unless the amount for which he was to become surety should be deposited with him for the space of two years. The plaintiff accordingly deposited with the defendant the sum of 49*l.*, who thereupon became surety for the plaintiff and he was released. The plaintiff before the expiration of the two years brought the present action to recover back the 49*l.* deposited with the defendant, and Stephen, J., before whom the action was tried, gave judgment for the plaintiff on the authority of his former decision in *Wilson* v. *Strugnell.* (1)

The defendant appealed.

Alfred Cock, for the defendant. First, the action is brought too soon: the two years had not expired. Secondly, at the trial, Stephen, J., gave judgment for the plaintiff upon the authority of *Wilson* v. *Strugnell* (1); but that case was not rightly decided and

(1) 7 Q. B. D. 548.

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ought not to be followed. The object of the transaction between the plaintiff and the defendant was that the defendant should not in fact be personally responsible for the plaintiff's good behaviour, although he was to be held out to the Court as personally liable for the sum of 49*l*. This was an illegal purpose, and the plaintiff cannot recover without proving that it did in truth exist: therefore the principle of *Taylor* v. *Chester* (1) applies. The plaintiff cannot rely upon *Bone* v. *Ekless* (2), because in that case the illegal purpose had not been carried out, nor upon *Taylor* v. *Bowers* (3), because in that case the plaintiff did not seek to uphold the illegal transaction but was repudiating it.

[BOWEN, L.J. If the illegal purpose has not been carried out, it appears to be clear that the money deposited can be recovered back: *Tappenden* v. *Randall* (4). But in the present case the illegal purpose seems to have been effected.

BRETT, M.R. The test whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires any aid from the illegal transaction to establish his case: *Simpson* v. *Bloss.* (5)]

In *Cripps* v. *Hartnoll* (6) the promise to indemnify was not made by the person for whose appearance the surety was bound: moreover, that case was decided upon a question as to the construction of the Statute of Frauds, and not upon a question of illegality. In *Jones* v. *Orchard* (7) the Court of Common Pleas seemed to be of opinion that an action like the present was not maintainable.

Stanley Boulter, for the plaintiff. The present case is identical with *Wilson* v. *Strugnell* (8); and if that case was rightly decided, the present plaintiff is entitled to succeed. The contract is still executory, and not executed. It may be that the plaintiff must admit that the contract had an illegal object, for otherwise he could not recover until the expiration of the two years; it is no doubt the illegal object which gives him the right to rescind: but the illegality consisted in the payment of the money upon the

(1) Law Rep. 4 Q. B. 309.
(2) 5 H. & N. 925.
(3) 1 Q. B. D. 291.
(4) 2 B. & P. 467.
(5) 7 Taunt. 246.
(6) 4 B. & S. 414; 32 L. J. (Q.B.) 381.
(7) 16 C. B. 614, at p. 624.
(8) 7 Q. B. D. 548.

default of the plaintiff, and the money has never been paid: therefore the illegal purpose has never been fulfilled.

Alfred Cock, was not called upon to reply.

BRETT, M.R. In this case the plaintiff has sued upon a contract entered into between himself and the defendant. What is it that determines and constitutes a contract not under seal? It is the consideration and the promise: these two incidents are necessary to constitute every simple contract: taken together, they form the whole of the contract. When the object of either the promise or the consideration is to promote the committal of an illegal act, the contract itself is illegal and cannot be enforced. In the present case the defendant required the plaintiff to deposit 49*l.* for the space of two years, and in consideration of the plaintiff so doing the defendant promised the plaintiff to become a surety for him: the plaintiff on his part undertook to deposit the 49*l.* That is the substance of the contract; is it illegal? To my mind it is illegal, because it takes away the protection which the law affords for securing the good behaviour of the plaintiff. When a man is ordered to find bail, and a surety becomes responsible for him, the surety is bound at his peril to see that his principal obeys the order of the Court: at least, this is the rule in the criminal law; but if money to the amount for which the surety is bound is deposited with him as an indemnity against any loss which he may sustain by reason of his principal's conduct, the surety has no interest in taking care that the condition of the recognisance is performed. Therefore the contract between the plaintiff and the defendant is tainted with illegality.

It was first argued that the action is brought too soon, because it is brought before the expiration of the two years. If the contract were legal, the action would have been brought too soon, and in this point of view the action can be maintained only if the contract is illegal. For the defendant it may be said that the illegal object itself would be sufficient to prevent the plaintiff from recovering; and further, that if it is necessary in order to defeat the action that the illegal contract should be performed, the illegal contract has in this case been performed. I will not stop to say whether in order to defeat the plaintiff in an action

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like this, the defendant must be able to prove that the illegal object is performed, or whether it is sufficient that the contract itself shall be tainted with illegality; for if the contract is illegal and has been performed, then the person vouching the illegality cannot recover. In this case the illegal purpose has been wholly performed, and therefore the plaintiff cannot recover. We differ from Stephen, J., only in this, that we think that the contract was fully concluded: Stephen, J., thought that the contract was not fully concluded. We think that it was fully performed for this reason, that the defendant did not contract with the plaintiff to pay the amount of the recognisance: the payment of that amount was not part of the illegal purpose existing between the plaintiff and the defendant; it was an obligation imposed by the law upon the defendant. The illegal purpose was fully completed when the defendant became surety. The time for returning the money has not as yet arrived; but when it does, I cannot think that the plaintiff will be in any better position than he is now. I cannot agree with the view of Stephen, J., or with his decision.

BAGGALLAY, L.J. I will very briefly state my view of this case. If the defendant had been compelled to pay the sum on account of the plaintiff's breach of the condition of the recognisance, it must be admitted that the defendant would be entitled to succeed; the maxim, "in pari delicto potior is conditio possidentis," would apply. But the rule governing the present case is, I think, well stated by Mellor, J., in delivering the judgment of the Court of Queen's Bench in *Taylor* v. *Chester*. (1) He there said: "The true test for determining whether or not the plaintiff and the defendant were in pari delicto, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party." Applying that rule to the present case, I am of opinion that the defendant is entitled to judgment. I do not think it necessary to refer minutely to the decision of Stephen, J., in *Wilson* v. *Strugnell* (2), and to the reasoning upon which it is founded. I am far from expressing dissent as to his view that where the illegal purpose has not been effected, the money

(1) Law Rep. 4 Q. B. 309, at p. 314. (2) 7 Q. B. D. 548.

deposited may be recovered back; but, on the other hand, I am hardly prepared to say that, in order to prevent a plaintiff from succeeding who sues to recover back money deposited in furtherance of an illegal purpose, the illegal object itself must be fully carried out.

BOWEN, L.J., concurred.

Judgment for the defendant.

Solicitor for plaintiff: *E. D. Lewis.*
Solicitors for defendant: *Freeman & Winthrop.*

J. E. H.

[IN THE COURT OF APPEAL.]

May 22.

BOWKER *v.* EVANS.

Arbitration—Action for Tort—Order of Reference—Death of Party before making of Award—Maxim, "Actio personalis moritur cum personâ."

The parties to an action for a tort agreed before trial to refer the matter in dispute to an arbitrator. The order of reference contained a clause that the arbitrator should publish his award "ready to be delivered to the parties in difference, or such of them as require the same (or their respective personal representatives, if either of the said parties die before the making of the award)." After the hearing of the reference had been concluded, but before the award was made, the plaintiff died. The arbitrator afterwards published the award, and the executors of the plaintiff having proved his will, took up the award:—

Held, that the cause of action being in tort died with the plaintiff and did not pass to his personal representatives by force of the clause above mentioned, which in an action of tort was inoperative, and that the executors were not entitled to be substituted as plaintiffs in place of their testator.

ACTION for a tort.

The writ of summons was issued on the 22nd of June, 1883. Before the trial the parties agreed to refer the matter in dispute to an arbitrator. The order of reference was dated the 28th of May, 1884, and provided that the arbitrator should publish his award "ready to be delivered to the parties in difference, or such of them as require the same (or their respective personal representatives, if either of the said parties die before the making of the award)." These words were the same as those in Rules of

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the Supreme Court, 1883, App. K., No. 24. The arbitration proceeded, and the parties were heard: the hearing came to an end on the 29th of September, 1884. The plaintiff died on the 4th of November, and the time for making the award was finally enlarged on the 24th of November. The award was ultimately made on the 30th of December. The will of the plaintiff was proved on the 5th of January, 1885, and on the 15th the executors took up the award. On the 17th of January the executors applied to a district registrar for an order, whereby they might be substituted as plaintiffs in place of their testator; the district registrar refused to make an order, but, on appeal, Field, J., ordered that the executors should be substituted as plaintiffs. The Queen's Bench Division having set aside the order of Field, J., the executors appealed to the Court of Appeal.

May 21, 22. *Ambrose, Q.C.*, and *Edmund Sutton*, for the executors of the plaintiff. The question is whether the cause of action survives owing to the words of the order of reference. It is true that it was held in *Toussaint* v. *Hartop* (1) that where a verdict had been found for the plaintiff, subject to an award, and before award made the defendant had died, a subsequent award of a verdict for the defendant, and judgment thereon, could not be supported; but it was suggested by the Court that if special stipulations were entered into, the reference would not be defeated by the death of one of the parties. In the present case the stipulations in the order of reference will allow the executors of the plaintiff to enforce the award. And in *Bower* v. *Taylor* (2) it was held that an award was not vitiated by the death of one of the parties. Similarly, if a stranger to the cause become by rule of court party to a reference made in the cause before any jury is sworn, and if, after the award made, but before judgment, one of the parties to the cause die, the rule of court is not defunct as to the stranger: *Rogers* v. *Stanton*. (3)

[BRETT, M.R. *Bower* v. *Taylor* (2) and *Rogers* v. *Stanton* (3) appear to have been actions of assumpsit, in which the cause of action survives for and against personal representatives: this is a case of tort.]

(1) 7 Taunt. 571. (2) 7 Taunt. 574. (3) 7 Taunt. 575, n.

But even an action of assumpsit would abate under the old practice upon the death of one of the parties. In *Cooper* v. *Johnson* (1) it was again suggested that a clause might be inserted in orders of Nisi Prius to obviate the inconvenience arising from the death of either party, before the making of the award. The application of the general rule of law may be guarded against by the contract of the parties: *Tyler* v. *Jones* (2); *Clarke* v. *Crofts* (3); *M'Dougal* v. *Robertson.* (4) In the present case the parties have agreed that the action shall not die upon the death of one of the parties. The principle applies whether the action is in contract or tort; and it was expressly held to extend to tort in *Lewis* v. *Winter.* (5) The decision in *Wilkins* v. *Cauty* (6) is to be explained by the fact that no provision had been made by the agreement of the parties for the death of either of them.

[BRETT, M.R. In the present case no verdict has been taken; and this circumstance distinguishes it from many of the decisions that have been cited.]

The authorities are summed up in 1 Wms. Executors, pt. 2, bk. 3, ch. 4, p. 912 (8th ed.), and it follows from them that where a clause is inserted in a submission to arbitration providing that in case of the death of either of the parties before the making of the award, it shall be delivered to his personal representatives, an award made after the death of either of the parties is valid for or against his personal representatives. In the present case the parties have agreed that their personal representatives shall stand in the same position that they do, and hence the executors are entitled to be made parties to the action: *Lewin* v. *Holbrook.* (7) If the contention for the executors is not correct, the words of the order of reference are absolutely unmeaning and nugatory in an action of tort. If a verdict had been taken in the action, the executors would clearly have had a right to be substituted as plaintiffs under the Rules of the Supreme Court, 1883, Order XVII., rules 1, 2, 3. But, further, it may be argued that although the original cause of action went by death, the cause itself is not gone

(1) 2 B. & Ald. 394.
(2) 3 B. & C. 144.
(3) 4 Bing. 143.
(4) 4 Bing. 435.
(5) W. W. & D. 47.
(6) 1 Dowl. (N.S.) 855.
(7) 11 M. & W. 110.

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because of the words in the order of reference: those words amounted to a contract, and there was sufficient mutuality between the parties to support it. The maxim, "Actio personalis moritur cum personâ," does not apply. By the order of reference the original cause of action in tort was gone, and a new cause of action in contract, founded upon the agreement therein contained, was substituted: the present case is governed by a principle similar to that laid down by Chitty, J. in *Conolan* v. *Leyland*. (1)

Sir F. Herschell, S.G., and *Heywood*, for the defendant, were not called upon to argue.

BRETT, M.R. In this case it was alleged by the plaintiff that the defendant had done something for which he was entitled to a remedy, and that the defendant's acts amounted to a tort. It is alleged that the plaintiff had a cause of action for a tort; therefore he was entitled to a remedy, if he could obtain it whilst he was alive; but if he did not the remedy died with him: the cause of action cannot now be tried. The action might have been tried either by a judge alone or by a judge and jury, or by an arbitrator. The agreement between the parties was that an arbitrator should be chosen, and that he should decide whether upon the facts a cause of action existed or did not exist. It was simply an agreement as to the mode of procedure, and there was no agreement that the arbitrator should decide whether the cause of action continued to exist after the death of one of the parties. The arbitrator was bound to decide the cause according to the ordinary principles of law. The right to compensation remained, as it would have existed in an ordinary action: nothing was altered. I repeat that it was an agreement as to procedure and as to the mode of procedure. If the subject-matter of dispute is gone, the agreement as to the mode of deciding it becomes invalid. The cause of action being gone, it is futile to consider what might have been the rights of the parties. The stipulation as to the delivery of the award to the respective personal representatives of the parties if either of them dies before the making of it being a matter of procedure, it has become absolutely futile, and has no meaning and no sense, and must be struck out of the

(1) 27 Ch. D. 632.

order of reference; that is, the order of reference must be read as if the stipulation were omitted, the action being in tort. The stipulation has been introduced inadvertently, and we must decide the appeal on the footing that the cause of action was gone upon the death of the plaintiff, that the jurisdiction of the arbitrator then determined, that there was nothing for him to decide, and that his award cannot be enforced. I think that this appeal must be dismissed.

BOWEN, L.J., concurred.

Appeal dismissed.

Solicitor for plaintiff's executors: *J. Burton, for Bowden & Walker, Manchester.*

Solicitors for defendant: *Chester & Co., for Crofton & Craven, Manchester.*

J. E. H.

[IN THE COURT OF APPEAL.]

June 13.

WATERHOUSE & CO., *v.* GILBERT.
W. H. S. GILBERT, CLAIMANT.

Practice—Interpleader—Appeal — Summary Decision at Chambers — Appeal from Queen's Bench Division to Court of Appeal—Common Law Procedure Act, 1860 (23 *&* 24 *Vict. c.* 126), *s.* 17—*Appellate Jurisdiction Act,* 1876 (39 *&* 40 *Vict. c.* 59), *s.* 20—*Rules of the Supreme Court,* 1883, *Order LVII., rr.* 8, 11.

By the combined operation of the Common Law Procedure Act, 1860, s. 17, and of the Appellate Jurisdiction Act, 1876, s. 20, no appeal lies to the Court of Appeal from a decision of the Queen's Bench Division upon an appeal from the summary decision at chambers of an interpleader summons, and r. 11 of the Rules of the Supreme Court, 1883, Order LVII., does not confer any power to give leave to appeal.

THE goods of the defendant were seized in execution by the sheriff, and were claimed by the grantee under a bill of sale. The sum in dispute was small, and amounted to about 48*l.* The sheriff having interpleaded, a master in chambers decided summarily in favour of the grantee of the bill of sale, but he gave leave to appeal. The execution-creditor appealed to Denman, J., at chambers, who held that no appeal would lie, and he again appealed to the Queen's Bench Division (Lord Coleridge, C.J., and Cave, J.),

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who also held that no appeal would lie. He then appealed to the Court of Appeal.

Torr (*Scrutton* with him), for the claimant, the grantee under the bill of sale. A preliminary objection exists to the hearing of this appeal: no appeal will lie to this Court from a summary decision upon an interpleader summons at chambers; this case was decided at chambers under Rules of the Supreme Court, 1883, Order LVII., rule 8, and by rule 11, except where otherwise provided by statute, the decision of a Court or judge in a summary way under rule 8 shall be final and conclusive unless special leave be given to appeal. In the case of a summary decision upon an interpleader summons it had been specially provided by statute that there should be no appeal: the statute referred to is s. 17 of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), and this enactment was saved from repeal when the Act itself was almost wholly repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49). And by the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 20, it is enacted that where by Act of Parliament it is provided that the decision of any Court or judge whose jurisdiction is transferred to the High Court is final, an appeal shall not lie from the decision of the High Court of Justice to the Court of Appeal. That statute applies to the present case. The argument for the claimant may be thus stated: first, rule 11 of the Rules of the Supreme Court, 1883, Order LVII., does not apply to this case: secondly, if it does, it is ultra vires.

As to the authorities, it was held in *Dodds* v. *Shepherd* (1), decided after the coming into operation of the Supreme Court of Judicature Acts, 1873, 1875, that those statutes made no difference in the rule that no appeal will lie from the summary decision of a judge in chambers upon an interpleader proceeding. In *Robinson* v. *Tucker* (2), and *Dawson* v. *Fox* (3), the question was as to the right of appeal from the trial of the issue.

Garnet Man, and *William F. Barry* (*Lynden Bell* with them), for the execution creditor. Rule 11 of the Rules of the Supreme

(1) 1 Ex. D. 75. (2) 14 Q. B. D. 371.
(3) 14 Q. B. D. 377.

Court, 1883, Order LVII. is inconsistent with s. 17 of the Common Law Procedure Act, 1860, and therefore it operates as a repeal by implication of that enactment: that rule is not ultra vires, and it was competent to the judges to make it, because it is a rule as to a matter of procedure within the meaning of the Supreme Court of Judicature Act, 1875, s. 17, sub-s. 2.

[COTTON, L.J. A right of appeal is not a matter of procedure. (1) Is not rule 11 intended to restrict the general right of appeal given by the Supreme Court of Judicature Act, 1873, s. 19 ?]

The rule was intended to confer a right of appeal in interpleader cases, and to vary the existing law. Sect. 20 of the Appellate Jurisdiction Act, 1876, does not apply to subsequent legislation, and the Rules of the Supreme Court, 1883, being made under statutory powers, have the force of a statute.

Alfred Cock, for the sheriff.

Torr, did not reply.

BRETT, M.R. I was desirous that all the ordinary members of this Court should be present to determine the question of jurisdiction, it being of importance. I will now pronounce our unanimous decision.

We all are of opinion that rule 11 of Order LVII., has not in any affected the 20th section of the Act of 1876. Reading s. 20 of the Act of 1876, and applying to it s. 17 of the Act of 1860, we are all of opinion that in such a case as the present there is no appeal from the decision of the Divisional Court to this Court, or power in the Divisional Court, or in this Court, to give leave to appeal to this Court.

BAGGALLAY, COTTON, LINDLEY, BOWEN and FRY, L.JJ., concurred.

Appeal dismissed.

Solicitor for the claimant: *Horace W. Chatterton.*

Solicitor for the execution-creditor: *Churchley.*

Solicitor for the sheriff: *Maynard.*

(1) See *Attorney General* v. *Sillem*, 10 H. L. C. 704.

J. E H.

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June 18.

[IN THE COURT OF APPEAL.]

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF BIRKENHEAD *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY AND THE GREAT WESTERN RAILWAY COMPANY.

Sewer—Right of Access to—Injuriously affecting such Right—Compensation—Lands Clauses Consolidation Act, 1845, *s.* 68—*Railways Clauses Consolidation Act*, 1845, *s.* 6.

The plaintiffs, in 1843, under the authority of a local Act, constructed a sewer on land part of which had been bought by the defendants, a railway company, but had not then been used for their works. Part of the remainder was bought by the defendants after the construction of the sewer, but no part of the land was the plaintiffs', or had ever been granted to them. The local Act not only authorized the plaintiffs to make the sewer, but vested it in them, with the duty to repair it, without, however, giving them any express right of access thereto. In 1863 the defendants, in exercise of the powers conferred on them by their special Act, with which was incorporated the Railways Clauses Consolidation Act, 1845, constructed an embankment over the sewer which, though it made it less easy, did not prevent the plaintiffs getting access to the sewer in order to repair it. The plaintiffs being obliged afterwards to repair, and having incurred extra expense in doing so in consequence of the embankment, claimed compensation from the defendants under s. 68 of the Lands Clauses Consolidation Act, 1845, and s. 6 of the Railways Clauses Consolidation Act, 1845, for injuriously affecting the plaintiffs' interest in the sewer:—

Held, by the Queen's Bench Division, that the plaintiffs had no interest in land within the meaning of the Lands Clauses Consolidation Act, 1845, s. 68, and therefore could not maintain the claim to compensation:—

Held, by the Court of Appeal, that as a right of access to the sewer had not been expressly given by the local Act but had to be implied, the right of access which ought to be implied was not any particular mode of access, but such only as was reasonably necessary for enabling the repair of the sewer to be done, and as that had not been prevented by the defendants' embankment, but only rendered less easy and convenient, the plaintiffs had no right to compensation.

1. SPECIAL CASE stated in an action brought by the plaintiffs against the defendants to recover the sum of 1530*l.* the amount of compensation assessed by a jury upon an inquisition under the Lands Clauses Consolidation Act, 1845, and the sum of 181*l.* 4*s.* 6*d.* for the taxed costs of the inquisition.

2. The plaintiffs claim the compensation under s. 68 of the Lands Clauses Consolidation Act, 1845, and ss. 6 and 16 of the Railways Clauses Consolidation Act, 1845, in respect of a certain

sewer situate within the borough under the circumstances hereinafter stated.

3. The sewer was constructed by the Birkenhead Improvement Commissioners in or about the year 1843 under the powers of the Birkenhead Improvement Act, 1833 (3 Wm. 4, c. lxviii. (local and personal)). By virtue of the charter of incorporation of the borough of Birkenhead dated the 13th of August, 1877, the Municipal Corporations Act, 1835 (5 & 6 Wm. 4, c. 76), the Municipal Corporations (New Charters Act) 1877 (40 & 41 Vict. c. 69) and a scheme dated the 28th day of October, 1879, and of the Public Health Acts, 1872 and 1875 (35 & 36 Vict. c. 79 and 38 & 39 Vict. c. 55), all the powers, property, and rights of the Birkenhead Improvement Commissioners are vested in the plaintiffs. The plaintiffs have no title to or interest in the sewer except such title or interest, if any, as they have under and by virtue of the charter and Acts mentioned in this paragraph, and by the construction and use of the sewer as a public sewer down to the present time. Previous to the time of the construction of the sewer part of the land on which it was afterwards constructed was land which had been bought and inclosed by the Birkenhead Railway Company but which they had not yet used for their works, and the other part of the land was open field, which was to some extent at times overflowed by the tide, and part of which was, subsequently to the construction of the sewer, bought by the railway company. The land was not nor was any part of it the property of the Birkenhead Improvement Commissioners, and no grant, conveyance, or lease of any part thereof was ever obtained by them or by the plaintiffs, nor has any payment been made to any body or persons by way of purchase-money, rent, or compensation for the land or any easement or right therein.

4. In or about the year 1863 (but less than twenty years after the construction of the sewer) the Birkenhead Railway Company and their successors, the defendants, in exercise of the powers conferred upon them under the Acts enumerated in the first schedule annexed to this case (1), constructed an embankment over the sewer. All the powers rights obligations and liabilities of the Birkenhead

(1) 1st SCHEDULE. RAILWAY ACTS.
1. 1 Vict. c. cvii. 1837.
2. 22 & 23 Vict. c. lxxiv. 1859.
3. 24 & 25 Vict. c. cxxxiv. 1861.

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Railway Company are now transferred to the defendants by virtue of those Acts.

5. No notice to treat was given in relation to the sewer by the Birkenhead Railway Company or the defendants, nor has any compensation been made by them or by the defendants in relation thereto.

6. Before the year 1879 the sewer became more or less out of repair, and in or about the year 1879 it further gave way and repairs became necessary which could not be done from the inside, and it became necessary in that and the following year for the plaintiffs to make an open cutting through the embankment over the sewer in order to obtain access thereto for the purposes of such repairs, and at the plaintiffs' request the defendants gave their consent to this being done.

7. By notice dated the 7th day of January, 1884, the plaintiffs claimed the sum of 2000*l.* as compensation for the increased difficulty and expense of access to the sewer for the purposes of repairs. The defendants, under protest, issued their warrant to the sheriff to summon a jury, and an inquisition was duly held at Birkenhead on the 15th of February, 1884, when the defendants appeared under protest, and the jury by their verdict assessed the amount of compensation at the sum of 1530*l.* No previous offer of compensation was made by the defendants.

8. No claim was made by the plaintiffs for damage to the sewer itself or for any part of the cost of the actual repairs done to the sewer.

9. In addition to the before-mentioned Birkenhead Improvement Act, 1833, the Acts enumerated in the 2nd Schedule annexed to this case (1) have been passed relating to the district of the said Birkenhead Improvement Commissioners or the plaintiffs.

10. Either party was to be at liberty to refer to any of the

(1) 2nd SCHEDULE.

BIRKENHEAD ACTS.

1. 1 Vict. c. xxxiii. 1838.
2. 5 Vict. c. v. 1842.
3. 6 Vict. c. xiii. 1843.
4. 6 Vict. c. xxiv. 1843.
5. 7 Vict. c. xxxii. 1844.
6. 9 Vict. c. xxviii. 1846.
7. 13 Vict. c. iii. 1850.
8. 21 & 22 Vict. c. lxxxv. 1858.
9. 21 & 22 Vict. c. cxxi. 1858.
10. 26 & 27 Vict. c. cvi. 1863.
11. 30 Vict. c. xcii. 1867.
12. The Birkenhead Corporation Act, 1881.
13. The Birkenhead Corporation Gas and Water Act, 1881.

before-mentioned Acts of Parliament and to the plaintiffs' notice of claim and the warrant and the verdict and judgment recorded upon the inquisition as part of the case.

The question for the opinion of the Court was whether upon the facts stated and the inferences to be drawn therefrom the plaintiffs were entitled to judgment.

R. S. Wright (*C. Higgins*, with him), for the plaintiffs. The sewer is vested in the corporation, and their use of it has been made more onerous by the defendants, and a right to compensation follows where it is shewn that there is an interest in land, and that it is injuriously affected. No question of time arises.

Bosanquet, Q.C. (*W. R. Kennedy*, with him), for the defendants. The plaintiffs have never acquired any title to the land either by purchase or user. Without some title they cannot be said to have property in the land, and without property they have no right to compensation.

1884. Dec. 20. The judgment of the Court (Mathew and Day, JJ.) was read by

DAY, J. This is an action brought upon an inquisition under the Lands Clauses Consolidation Act held to assess compensation in damages alleged to have been caused by the defendants (including always under that designation their predecessors in title) in injuriously affecting the interest of the plaintiffs in a sewer situate within the district under the control of the plaintiffs (including always under that designation their predecessors) as sewer authority, and the question to be determined by us is whether the plaintiffs had such an interest in this sewer or in the lands in which it is situate as to support such a claim for compensation. The injury alleged is by reason of the defendants in 1863 and within twenty years from the construction of the sewer having placed an embankment over the sewer which necessarily renders its repair ab extra more costly to the plaintiffs.

It seems to us that they have no such title or interest. The twenty years not having elapsed no title by prescription was acquired by the plaintiffs as against the landowners, and the plaintiffs had no title at law; whatever title or right or interest

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they had must be sought in equity; the Birkenhead Act transfers estate, but does not create it.

We assume in favour of the plaintiffs that the sewer was constructed by them upon the land of the defendants and with their knowledge and acquiescence; this, however, would not vest in the plaintiffs any title to the land, or any right other than the right in equity to obtain protection from disturbance by enforcement of legal right; and, may be, to have an appropriate conveyance made to them, but only upon payment of fair price or compensation. In this case no conveyance has been obtained or sought by the plaintiffs, no price or compensation had been paid or tendered by them; and, in our judgment, no title had been obtained by the plaintiffs in 1863, nor any interest in land within the meaning of the Lands Clauses Consolidation Act, s. 68. But even if a right to maintain a claim to compensation exists, it would clearly be subject to the prior right of the defendants to be paid the price of the land or easement taken; and the two amounts would seem to us to be substantially equivalent; and certainly it would be unreasonable to allow the plaintiffs to recover compensation from the defendants in respect of injury to the right before they complete their title as against the defendants by paying the price of the right to be acquired.

We may further observe that if title by acquiescence to the sewer is to be inferred in favour of the plaintiffs, as good a title by acquiescence might and should be inferred in favour of the defendants to their embankment; and then, again, both rights would be equivalent in value.

In our view of this case it is unnecessary to consider separately the titles under which the defendants hold.

Judgment for the defendants.

A. M.

The plaintiffs appealed.

R. S. Wright, and *C. Higgins*, for the plaintiffs. The plaintiffs' interest in the sewer was injuriously affected by the construction over it of the railway embankment, and therefore the plaintiffs were entitled to compensation under s. 68 of the Lands Clauses Consolidation Act, 1845. There is no limitation of time to the

plaintiffs' right: *Pettiward* v. *Metropolitan Board of Works.* (1) By s. 102 of the Birkenhead Improvement Act, 1833 (3 Wm. 4, c. lxviii. (local and personal), power was given to the Birkenhead Improvement Commissioners, under whom the plaintiffs claim, to construct, inter alia, the sewer in question "and to cause the same to be altered, enlarged, repaired, cleansed or completed as the said commissioners" should "deem proper." Sect. 53 of that Act vested the sewer in such commissioners, and declared that it should be deemed to be the property of the commissioners for the time being. It is not necessary that the plaintiffs should have any land to entitle them to the compensation they claim in this action, an interest in land is sufficient, and that the plaintiffs had in this case, by virtue of the sewer and the space it occupied: *Rolls* v. *Vestry of St. George the Martyr, Southwark.* (2) Perhaps the case comes rather under the Railways Clauses Consolidation Act, 1845, than the Lands Clauses Consolidation Act, 1845. Sect. 6 of the Railways Clauses Consolidation Act, 1845, requires the railway company to give full compensation to persons interested in any lands taken for the railway "or injuriously affected by the construction thereof" for all damage sustained by them by reason of the exercise of the powers of that or the railway company's special Act.

[BRETT, M.R. The sewer has not been injured by what the defendants have done, nor is the access to it prevented, only it is not such and the same access to it as the plaintiffs had before the embankment was made.]

The access cannot be had now except at a great expense, and in that respect at least the plaintiffs' right has been injuriously affected: *In re Corporation of Dudley.* (3)

Bosanquet, Q.C., and *W. R. Kennedy*, for the defendants. If the land had been the land of private owners when the sewer was made the right of the commissioners who made it and of the plaintiffs claiming under them was not such a right as would give them a cause of action for what the defendants have done. The commissioners had only an implied right of access to the sewer in order to repair but no right to any particular access or mode of

(1) 34 L. J. (C.P.) 301. (2) 14 Ch. D. 785.

(3) 8 Q. B. D. 86.

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access. Next, the sewer was made after the railway company had acquired for their railway works part of the land on which it was made, and therefore the right of access to that part of the sewer was subject to the right of the railway to use it for their railway works.

BRETT, M.R. It seems to me that the plaintiffs have exaggerated their right. They had a right to make this sewer, and the Act of Parliament which gave them that right vested the sewer in them. They have the duty also to keep the sewer in repair. Now whether, the sewer being vested in them, they have an interest in land, it is not necessary to decide, though I am inclined to think that the sewer does give them an interest in land. But in the Act of Parliament which gave the plaintiffs the right to make the sewer and imposed on them the duty to keep such sewer in repair there is nothing expressly said as to their access to it for the purpose of performing such duty, and therefore their right of access is one which has to be implied. Under these circumstances I am of opinion that the rule of construction is not to imply any more right of access than is reasonably necessary to enable them to perform their duty.

The question then is, what sort of right of access we ought to imply. It seems to me that we ought to imply such right of access as may be necessary to enable the plaintiffs to do the repairs, but not any particular right of access which will enable them to do the repairs in one way rather than in another way. If so, and that is the only right of access which they ought to have, that right they have now, and nothing which the defendants have done has interfered with it.

It is said that the defendants have injuriously affected the rights of the plaintiffs; but if the plaintiffs' only right is to such access as may be necessary to do the repairs, that right has not been interfered with, and consequently it has not been injuriously affected. The test of whether a person's rights have been injuriously affected within the meaning of the Lands Clauses Consolidation Act, 1845, is whether, if the parties were private owners, an action would be maintainable for what had been done. Therefore, the question is whether if the defendants were private owners

and had done what they have in the present case, the plaintiffs could have maintained an action against them for doing it. Now, if the plaintiffs had had a particular right of access, which existed at the time the sewer was laid, then they might have had a right of action for interfering with such right of access, but if their only right of access was not the same as they had when the sewer was laid, but only such as was necessary to do the repairs, and consequently only such as was necessary to enable them to get to the sewer at the time they might want to do the repairs, they could not have maintained an action. What has been said before shews that they had no particular access, and therefore, shews that they have now no right to compensation under s. 68 of the Lands Clauses Consolidation Act, 1845. I think, therefore, for these reasons the judgment given by the Divisional Court was right, though I have not followed and adopted the reasons given for that judgment.

BAGGALLAY, L.J. I am of the same opinion and for the same reasons. The Master of the Rolls, as I understand, intended his observations to apply to the Railways Clauses Consolidation Act, 1845, as well as to the Lands Clauses Consolidation Act, 1845.

BOWEN, L.J. I am of the same opinion. The question whether the plaintiffs are entitled to compensation in respect of this sewer is really the same question as whether they would have had a right of action for what has been done supposing the defendants were not protected in doing so by the powers of their Railway Act. Accordingly what we have to consider is what is the true nature of the right conferred by s. 53 of the Birkenhead Improvement Act, 1833, which vested this sewer in the Improvement Commissioners under whom the plaintiffs claim, and s. 102, which authorized the commissioners to make it. The question really turns on s. 102, and the true canon of construction applicable to an enactment like this, which interferes with private property, is to read into it by implication only so much as is reasonably necessary to make the Act of Parliament work. Therefore, one ought only to imply that the statute gave the commissioners such powers as were reasonably necessary for the efficient working of the sewer

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system. For the purpose of so working it no particular mode of access, nor any particular degree or convenience of access is wanted, but all that is wanted is a right to go on the land of the owner and to get to the sewer, and such owner is not to do anything which would make it practically impossible for the plaintiffs to go on such land and exercise such right. Then if that is all the right the plaintiffs get under this enactment, that right has not been obstructed, and, therefore, no such claim can arise as has been made here.

Appeal dismissed.

Solicitors for plaintiffs: *F. Venn & Co., for A. Gill, Birkenhead.*

Solicitor for defendants: *C. H. Mason, for R. M. Preston, Chester.*

W. P.

July 3.

[IN THE COURT OF APPEAL.]

SAILING-SHIP "GARSTON" CO. *v.* HICKIE & CO.

Ship—Freight—Charterparty—"Port"—Final sailing of Ship from last Port.

The word "port" in a charterparty is to be understood in its popular, or business, or commercial sense; it does not in such a document necessarily mean the port as defined for revenue or pilotage purposes.

Tests for determining the business meaning of the word "port" considered.

A charterparty provided that a ship should load a cargo of coals at Cardiff, and then proceed to Bombay, the freight to be paid two-thirds in cash "ten days after the final sailing of the vessel from her last port in Great Britain," and the remainder in cash on delivery of the cargo. The ship loaded the coals in the Bute Docks, at Cardiff, and, having cleared at the Custom House, started on her voyage to Bombay. She proceeded down the artificial channel leading from the docks to the River Taff, and, when about 300 yards beyond the junction of the channel with the river, she came into collision with a steamer, and was so much injured that she was compelled to return the next day to the docks for repairs:—

Held, that at the time of the collision the ship was not outside the limits of the port, in the popular, business, or commercial sense of the word; that, consequently, she had not finally sailed from her last port; and that no freight was payable.

APPEAL by the plaintiffs from the judgment of Wills, J., at the trial of the action at the Liverpool assizes, on the 23rd of February, 1885. Wills, J., gave judgment for the defendants, with costs.

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The action was brought to recover freight. The plaintiffs were the owners of the ship *Garston*; the defendants were the charterers. The charterparty, dated the 27th of October, 1884, provided that the ship, then lying at Hamburg, should proceed direct to Cardiff or Newport, as ordered before leaving Hamburg, and there load a cargo of coal, and being so loaded, should forthwith proceed to Bombay. "The freight to be paid on unloading and right delivery of the cargo, at the rate of 18*s.* 6*d.* per ton on the quantity delivered . . . . the freight to be paid, say two-thirds in cash (less 5½ per cent. for interest and insurance) ten days after the final sailing of the vessel from her last port in Great Britain, the charterers holding the policy as collateral security, and the remainder in cash, at the exchange of 2*s.* per rupee, on the right and true delivery of the cargo agreeably to bills of lading, less cost of coals or coke delivered short of bill of lading quantity."

The ship, in pursuance of orders from the charterers, proceeded to Cardiff, and loaded in the Bute Docks there a cargo of 2895 tons of coal. On the 22nd of December, 1884, having cleared at the custom-house, she left the Routh Basin in the docks, and started on her voyage to Bombay. She was towed by a steam tug, which was to tow her as far as Lundy Island, and she proceeded safely down the artificial channel leading from the docks, past the pier-head, until she arrived about 300 yards beyond the junction of the artificial channel with the River Taff. She then came into collision with a steamer, and received so much damage that she had to put back the next day to Cardiff for repairs.

On the 2nd of January, 1885, the plaintiffs issued the writ in this action, which was indorsed with a claim for 1687*l.* 6*s.* 5*d.*, being two-thirds of the freight, less 5½ per cent. The defendants resisted the action on the ground that, at the commencement of the action, the vessel had not finally sailed from her last port in Great Britain. The main question in dispute was, whether the place where the collision occurred was inside or outside the limits of the port of Cardiff, within the meaning of the word "port" as used in the charterparty.

The pilotage rules, by-laws, and regulations adopted by the pilotage board of the port of Cardiff for the government of pilots

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and others, and approved by the Queen in Council, contained the following definition of the limits of the port of Cardiff: "Not to the eastward of a line drawn from the Rhymney River to East Cardiff buoy and Monkstone; not to the southward of a line drawn from the Monkstone to the Wolves; not to the westward of a line drawn from the Wolves to Lavernock."

The plaintiffs' contention was, that the port of Cardiff did not extend beyond the artificial works connected with the Bute Docks, and that the ancient port of Cardiff had been merged in those works.

Bigham, Q.C., and *Synnott*, for the plaintiffs.

Carver, for the defendants.

WILLS, J. I have taken some pains to come to a right conclusion in this case. I should have felt very little difficulty about it, but for the use of certain adjectives in one or two important cases which have been cited, the use of which, I cannot help thinking, has led to some misconception, and has certainly rendered it necessary for me to look into the matter a little more carefully than I should otherwise have done. In *Hull Dock Co.* v. *Browne* (1) it was held that, in an Act of Parliament which gave a dock company power to levy tonnage dues, the word "port" must be taken in its popular sense. And in *Price* v. *Livingstone* (2) it was said, that the word "port" in a charter-party must be taken in its ordinary commercial sense. It seems to have been thought that the use of these adjectives implies that there is a necessary contrast between the "popular" or "commercial" sense of the word "port" and its legal sense. But I think that, when those cases are carefully examined, it will be seen that the contrast intended was between the "port" as defined or existing for the revenue or fiscal purposes of the realm, and the legal "port," when there is a legal port. When there is a legal port, what is meant by the use of the expressions "popular sense" or "commercial sense" of the word "port"? One can well understand that the revenue port is not the thing to be looked at, because the boundaries of a revenue port have been established merely for the sake of the convenient collection of

(1) 2 B. & Ad. 43. (2) 9 Q. B. D. 679.

customs, and have nothing to do with the mercantile or nautical meaning of the word "port" as applied to a particular place. Take this particular place—Cardiff. The revenue port, I understand, extends sixty miles down the Bristol Channel, and there are, as we know, many other cases in which, for fiscal purposes, a port extends far beyond its limits as an ancient port constituted by legal authority. I think that the use of the words "popular" or "commercial," in any other sense than as contrasted with a port whose limits are defined for such special purposes as the collection of the revenue, would be a mistake. I think that where a port exists, in the true acceptation of the term, the popular or commercial sense of the word is identical with the legal sense. It is not very easy to give an exact definition of a port, but I apprehend that, for purposes like the present, it means a place of call for ships, where defined limits have been established by competent authority, and in England that competent authority would be a royal charter (including the case of a charter presumed from prescription, though the charter itself may have been lost) or a statute. Defined limits are those within which port dues are levied, or other authorities are exercised, such as are usually necessary for the administration of a port. Of course, where such a state of things exists, there will almost always be evidence of the actual physical boundaries of the port; there will be an area or limit defined with more or less certainty; sometimes by drawing a line from one headland to another, sometimes only by a practice of collecting dues on one side of a line and not on the other side. But, generally speaking, wherever there is a right to take money or exercise jurisdiction within a port, adequate means exist for establishing with reasonable certainty for commercial purposes the limits of the port. I can hardly conceive that in England, or, indeed, in any part of the civilised world, anything deserving to be called a port can exist which does not satisfy some such conditions. One does, indeed, occasionally, at places on the south coast of England (Brighton, for instance), see small vessels discharging odd cargoes on the beach, places which may possibly have some legal limits, but where there is no right to collect dues; but it would be difficult to say that such places answer the description of a port. It is, I

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think, extremely unlikely that, in any part of the world where ships resort, a port should be a mere place of call of that sort for ships. So far as I know, at all places of call for vessels in the nature of ports, certain things are provided for their use, such as moorings and buoys, which afford some test of the legal limits of the port. If there should ever arise a case of a port, in the vague and purely popular sense of the word, with no possibility of ascertaining any defined administrative limits, various questions may arise which it is not worth while to discuss now.

In the present case I am satisfied, from the parol evidence as well as from the conclusive evidence of the Acts of Parliament relating to these docks, that the port of Cardiff is an ancient port. It was an existing recognised port, where port dues were collected and port jurisdiction exercised, in 1830, when the first of these Acts was passed. It is easy to discover from that Act very nearly the exact limits within which the artificial works were to be carried on; they certainly ended southward either at or very near to that which is called the mouth of the River Taff, i.e., its junction with the artificial channel. Those very Acts, which gave to the Marquess of Bute various and definitive powers to be exercised within limits which are clearly defined as extending to the spot which I have mentioned, not only speak of Cardiff as an existing port, but in many places draw a clear distinction between the early jurisdiction and the new powers which were created in 1830, and it is abundantly clear that the old port of Cardiff was the more extensive of the two. Looking at the whole of these Acts, I should have felt very little doubt that the port of Cardiff as then existing comprehended Penarth Roads or Cardiff Roads which, as one witness has told us to-day, are really the same thing, and, as one would have supposed, they are subject to the regulations made by a board established by competent legal authority under an Act relating to the Bristol Channel, in which the limits of the port are not defined by legislation, but are spoken of as the existing limits of the port. But, apart from that description, I think there is abundant evidence in the Act of 1830 to shew, not only the existence of the port of Cardiff, which is spoken of in s. 86 as an existing thing, but that it extended far beyond the limits of the artificial works which the Marquess of Bute was

empowered to make. I may refer particularly to the group of sections in the Act of 1865, beginning with s. 34, and to ss. 50 and 56.

Now, if the ancient port extended at all beyond the artificial works, it is all but impossible that it should not have comprehended the place where this vessel was at the time of the collision, because it was only 300 yards south of the mouth of the Taff, which is the limit of the docks and works to be made under those Acts. It seems to me, therefore, without resorting to the definition of the port given in the rules made by the Pilotage Board, that there is abundant evidence to justify me in coming to the conclusion that the limits of the port must extend considerably beyond the limits of the artificial works, probably as far as Penarth Docks. But I see no reason why I should not take as pretty conclusive evidence the definition contained in the rules issued under the authority of the Pilotage Board. From every point of view, therefore, there is abundant evidence that this vessel was, at the time of the collision, within the limits of the port. And, if she was within the limits of the port, how can it be said that she had sailed, finally or at all, from the port? My judgment must therefore be for the defendants, with costs.

From this decision the plaintiffs appealed.

July 3. *French, Q.C.*, and *Synnott*, for the plaintiffs. The ship had finally sailed from the port when the collision occurred. In a charterparty the word "port" is to be understood in a "commercial sense," in the sense in which it would be used by commercial and business men: *Price* v. *Livingstone*. (1) Taking the word in that sense it is clear from the evidence that the ship was outside the port. In *Roelandts* v. *Harrison* (2) it was held, with reference to this very port of Cardiff, that by the terms "final sailing of the vessel from the port of loading," must be understood the final departure of the vessel from the port, so as to be out of the limits of the artificial port and at sea, and that a vessel which was wrecked in the artificial channel was not outside the port. In the present case the vessel had got beyond the artificial channel.

(1) 9 Q. B. D. 679. (2) 9 Ex. 444.

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[BAGGALLAY, L.J., referred to *Hudson* v. *Bilton* (1).]

No doubt, if the word "port" is to be understood in the sense which it bears for pilotage or revenue purposes, the vessel had not left the port; but, taking the word in its commercial or business sense, the evidence shews that she had left the port. This view is confirmed by the provisions of the special Acts relating to the Cardiff Docks: 11 Geo. 4 & 1 Wm. 4, c. cxxxiii.; 28 & 29 Vict. c. cccxxv. The ancient port of Cardiff has become merged in the new artificial works.

Moulton, Q.C., and *Carver*, for the defendants, were not heard.

BRETT, M.R. In my opinion this appeal must be dismissed. The question is, whether any freight has become payable under this charterparty in the events which have happened.

First, it is said, that, because the ship was to go from Cardiff, therefore, in the clause relating to the payment of freight, we must, as I understand the argument, construe the expression "the port" to mean, the town of Cardiff. The words are, "The freight to be paid two-thirds in cash, ten days after the final sailing of the vessel from her last port in Great Britain." It seems to me that we must read the words in their ordinary sense. It is to be "her last port." Now what is the last port which the vessel sailed from in Great Britain in the present case, or rather which she was going to sail from? Cardiff. Therefore, you must read it thus: "Ten days after the final sailing of the vessel from the port of Cardiff in Great Britain." That is the true meaning.

Now, in *Roelandts* v. *Harrison* (2) it was argued that, if the vessel had started from the innermost end of the port, with everything ready for her sailing to sea, and with the intention, when she started, of not stopping again till she reached her final place of destination abroad, that was a final sailing from the port within similar words in a charterparty. But the Court held, that the words, "final sailing from the port of loading," could not be satisfied by that, because the final sailing from the port is not at the time when the vessel starts from the innermost end of the port; it is not until she gets to the outer end of the port. Till then she has not sailed *from* the port; she is sailing *in* the port.

(1) 6 E. & B. 565. (2) 9 Ex. 444.

She must get outside the port. Then, in *Price* v. *Livingstone* (1) there came this question: Supposing the vessel has got outside the port, what is the meaning of the word "finally"? If she is going just outside the port only to drop anchor there, and is not starting on her voyage, or, if she is going outside the port with the intention of coming into it again, then she has not "finally" sailed from the port, although she has sailed from it. The vessel must both be outside the port and have "finally" sailed from it.

In the present case the question does not depend on the word "finally"; the whole question is, whether the vessel had sailed from the port, that is, was she outside the port within the meaning of the charterparty? My Brother Wills has taken exception to the language which has been used by other judges. He does not like their use of the words "popular," and "commercial," when they say that the word "port" is to be understood in its "popular" sense, or its "commercial" sense. I dare say those are not the best possible words. But the question is, whether they are not very good working definitions in the sense in which they have been used. But they are not the only words which have been used for the purpose. Some judges have said, "In the business sense of the word," "In the ordinary sense," "In the common and ordinary sense." All these phrases mean very much the same thing. It is not to be the fiscal port. The parties are not contracting with regard to that. The fiscal port, the limits of which are, of course, always fixed by Act of Parliament, is never in fact taken into consideration by shipowners or merchants employing ships. We all know that. We know also as a fact that the limits of many pilotage authorities extend far beyond anything which would be called in the ordinary sense "the port" of a particular place. For instance, a ship coming into the port of Liverpool is, I believe, bound by Act of Parliament to take a Liverpool pilot at Point Lynas; but everyone knows that Point Lynas is not, in any ordinary sense, within the port of Liverpool. Therefore, the word "port" in a charterparty does not necessarily mean an Act of Parliament pilotage port, or, which is the better word, pilotage district. Therefore, when you are trying to define the port with regard to which persons

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who enter into a charterparty are contracting, you endeavour to find words which will shut out those things which you know they do not intend. What do they intend? They intend the port as commonly understood by all persons who are using it as a port, i.e., for sailing to or from it with goods and merchandise. What persons are they? Shippers of goods, charterers of vessels, and shipowners. What do all those persons in their ordinary language mean by a "port"? What they understand by the word is the port in its ordinary sense, in its business sense, in its popular sense—i.e., the popular sense of such persons. It is also the port in its commercial sense, for, with them, business means commercial business. Therefore, with the greatest deference to Mr. Justice Wills, it seems to me that all these phrases are equally good, and that they all in substance mean the same thing. He seems to have been inclined to substitute the words, "the legal port;" but, with deference to him, in my opinion that would not do. The legal port may be fixed by an Act of Parliament about which nobody knows anything. It must mean the port which such persons as I have mentioned would be dealing with, for the purpose of ships going to or from it carrying goods.

Now, what will such a port be? What do you go to a port for? Because you want either to load or to unload goods. Every one who understands ships knows that you cannot conveniently load or unload goods in a place where the ship itself would be in danger. Therefore all people possessed of common sense, instead of taking their boats on to a beach on an open sea, where they might be knocked to pieces in a storm, go to what they call a port, which is always a sheltered place. It is a place of safety for the ship and the goods, whilst the goods are being loaded or unloaded. There will never be a port, in the ordinary business sense of the word, unless there is some element of safety in it for the ship and goods. Now what will constitute a port as regards the loading and unloading of goods, and the safety of the ship during the process? What will more certain to be a port, in the sense of all persons concerned in the use of it, than a natural port? That is, a place in which the conformation of the land with regard to the sea is such that, if you get your ship within certain limits, she is in a place of safety for loading and unloading. That is almost

certain to be the port of that place in a business sense. It would not do to say the natural sense, as independent from the business sense, though the one is almost certain to measure the other. But, if you can see with your eyes that the land is so shaped that there is protected water within a certain space, you may be almost sure that that will be the port which is spoken of by business men under a certain name—a place where there is protected water by reason of the natural lie of the land and water.

Of course, there may be an artificial port, which has the same effect as a natural port. For instance, if you build, as at Plymouth, breakwaters and walls, and thereby enclose a part of the sea, which, if you had not built those breakwaters and walls, would be a dangerous and unprotected part of the sea, the moment you have built these things you make that inclosed part of the sea protected water; and you may be sure that, if the water within the walls was, before they were built, not within the port, commercial men will very soon afterwards call that water within those walls the port, and deal with it upon the faith that, when a ship is within the walls, she is within the port, and, when she is outside the walls, she is at sea. That is not a natural port; it is an artificial port; but it is an actual port.

Now, sometimes you have only a place of comparative safety, a place in which neither the natural configuration of the land with regard to the sea, nor the artificial walls, make a perfectly safe port, but only a place of comparative safety. Then you have not such easy means of ascertaining what the parties to a charterparty must have meant by "the port," and you must find out where, in fact, people have had their ships loaded and unloaded. The moment you can find that the loading and unloading of ships takes place at a particular spot, you may safely infer that the parties understood that spot to be within "the port," because, as a general rule, people do not load or unload goods outside a port. They do sometimes, but very seldom, and only under exceptional circumstances. If, therefore, you can find a place of loading and unloading, you have another safe rule. But the port may extend beyond the place of loading and unloading, just as a dock may. The space in the centre of a large dock is seldom used for loading and unloading. Vessels may load or unload in the middle of the docks,

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but they seldom do so. They generally load and unload at the quay, which is at the edge of the dock. Therefore, although the loading and unloading of goods is not always the exact measure of a port, it is a safe rule to say that the loading and unloading takes place within the port.

Then, if you want to find out how far the port extends beyond the place of loading and unloading, what is the next test you would apply? If you find that the authorities, who are known in commercial business language as "the port authorities," are exercising authority over ships within a certain space of water, and that the shipowners and shippers who have ships within that space of water are submitting to the jurisdiction which is claimed by those authorities, whether legally or not, whether according to Act of Parliament or not, if you find what are called "the port authorities" exercising port discipline, and the ships which frequent that water submitting to the port discipline so exercised, that seems to me the strongest possible evidence that the shipowners, the shippers, and the port authorities (that is, the persons connected with the locality), have all come to the conclusion to accept that space of water in which that authority is so exercised and submitted to as "the port" of the place.

All these seem to me to be proper tests whether a certain space of water is a port within the popular sense, the business sense, the commercial sense, or the ordinary sense—anything you please but an Act of Parliament or a fiscal sense.

Now to apply these rules in the ordinary business sense to the present case. We have the chart, which shews the conformation of the land with regard to the sea. Whether Penarth Roads are within the port of Cardiff, I decline to decide on this occasion. We shall no doubt have to decide that question some day. The present question is, whether the place where this ship was when she ceased to move (for that is the point) is within the port, or not? Now that place is to the northward of the headland of the Penarth Docks. Therefore, on this occasion, we have only to consider whether the water inside the headland of the Penarth Docks is within the port of Cardiff. To my mind the chart itself settles that matter. Any evidence of individual shipmasters as to what they consider to be the port would have very little effect on my

mind after I had looked at the chart, and I am sure it would not have any effect on the mind of any ordinary man of business. The chart seems to be almost conclusive that the water inside the headland of the Penarth Docks is within the port of Cardiff.

But what have you next? There is the evidence of the plaintiffs' own witnesses. It is said that there must be a primâ facie case. To my mind the bulk of the plaintiffs' evidence has made out the defendants' case. But it must be a primâ facie case for the plaintiffs. The evidence of the dock or harbour-master, when he was pressed, seems to me conclusive. He says the Penarth Docks are within the port. Probably he did not mean that the water within the dock gates is within the port. He probably meant that the entrance to the Penarth Docks is within the port, that is, that the port extends at least to the headland to which the Penarth Docks are made. That is one limit. Then, as I understand his evidence, and it seems to me to be clear, he puts the north limit of the port at the artificial works of the Bute Docks. His intention to my mind was to exclude the Bute Docks, and to exclude the Penarth Docks, but he says that the port is the water between the two. That would give the north and south limits of the port. But, when you come to see what is the nature of the water between those north and south limits, and that it includes what are called Penarth flats, and Cardiff flats, to say that those places, which are left nearly dry, or quite dry, at low water, are not within the port, would be to my mind an outrage on the common sense of anybody who understands what would be the conclusion of those persons who have to do with such a thing as a port.

What is there more? You have by-laws made by persons (I do not care whether they had or had not the legal right to make them) who were assuming the right to deal with the port. What do they say? They say that certain pilots shall be dealt with as sea pilots, and certain other pilots shall be dealt with as port pilots, and those port pilots are to be the pilots who may act within the port. That is their legislation. Then, in order to determine what is the port, they say what they understand by the port. What do they understand by the port? All the water going from the shore at the north-east side of the new docks

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away to the eastward towards the East Cardiff buoy; then turning south and coming down to the Monkstone; then turning to the westward and south-west and coming to the Wolves; then turning north and going to Lavernock Point, which is very far below the Penarth Docks headland. All that they say is within the port. Whatever is inside these limits is inside the port. If it were necessary now to decide what are the exact limits of the port, I should certainly say that this was the strongest evidence that the boundary of the port extends at least as far as that. I observe that, having so defined the port, they say that port pilots may lie for protection under Sully Island, which is to the westward of Lavernock Point, and it may be that that island is also within the port. I will not say at present whether Penarth Docks are within the port, but it seems to me clear (and that is all we have to decide to-day) that the evidence justified Wills, J., who was acting as a judge of fact, in finding as a fact that, within the meaning of all persons who deal with Cardiff as a port, the port of Cardiff covers at least the water to the north of the Penarth headland up to the Bute Docks, and, east and west, the Cardiff flats and the Penarth flats. I believe myself (but I do not wish this to be taken as my decision) that the port is much larger. I believe it is at least as large as it is stated to be in those by-laws. I come, therefore, to the clear conclusion, as the learned judge says he did, upon the evidence before him, including the chart, that this vessel was at the time of the collision inside the port of Cardiff in the sense which I have explained. And, if she had not left the port of Cardiff, she had not finally sailed from her last port in Great Britain. I am of opinion, therefore, that the judgment for the defendants must stand.

BAGGALLAY, L.J. I am of the same opinion. The question we have to decide is, whether the ship *Garston* had finally sailed from the port of Cardiff when she reached the spot which has formed the subject of the inquiry.

Now, as regards the words "finally sailed," there is very little difference of opinion. The old cases were considered in *Price* v. *Livingstone* (1), and each of the learned judges in that case

(1) 9 Q. B. D. 679.

pronounced an opinion how the words "finally sailed" ought to be interpreted, and there was no substantial difference between them. I think it was most concisely stated by Lindley, L.J., thus: "Final sailing, I apprehend, means getting clear of the port for the purpose of proceeding on the voyage." Accepting that as the true interpretation of the words "finally sailed," we have to consider whether the ship *Garston* had, when the collision occurred, finally sailed from the port of Cardiff. As the Master of the Rolls has pointed out, it is not necessary for us now to say what the exact limits of the port of Cardiff are; we have only to decide whether the particular point in question is within or without the port. I agree with the Master of the Rolls that that point is within the limits of the port. In *Roelandts* v. *Harrison* (1) it was decided that a vessel which had left the dock gates, and had got to a certain point, in what was called the artificial ship canal, had not "finally sailed" from the port, and the principles upon which that case was decided go this length, that, so long as a vessel remained within the artificial canal terminated by the pierhead, she would not have "finally sailed" from the port. It was not then necessary to decide more than that. But in *Price* v. *Livingstone* (2), the vessel had cleared from Penarth Docks, and had been towed for seven or eight miles to a point out in the Bristol Channel, about three miles from Lavernock Point. There it was held that she had finally sailed from the port of Cardiff. Between those two decisions a variety of questions may arise as regards the application of the general principles laid down in them. In the present case, following the course taken by the Master of the Rolls, I look at the chart, and it appears to me to give substantially two equivalents of headlands, namely, an inland water, with the Bute Docks, and their dependencies, forming the one margin, and the Penarth Docks forming the other margin. Between those limits there is a circular space of inland water, which, as it seems to me, must, according to all ordinary principles, be regarded as the port in its commercial or business sense: not for fiscal purposes, but for all ordinary business purposes. The spot where the *Garston* was is within the limits of the port so fixed. It is also within the limits of the channel by which a vessel must

(1) 9 Ex. 444. (2) 9 Q. B. D. 679.

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pass from the Bute Docks down the continuation of the river Taff and joining that river at the neck which forms the second river running into the Bristol Channel at that point.

But the matter does not rest there. We have the evidence of the pilotage rules, and the limits for pilotage purposes there indicated by reference to successive buoys and lights—the East Cardiff buoy, the Monkstone, and the Wolves. Those are the limits of the port for pilotage purposes. But what appears to me material in that is, that certain restrictions are imposed on persons navigating the channel within those limits. They are to do this and that, and, amongst other things, they are restricted from casting out any cinders or ballast on a certain portion of this district. These are rules which persons navigating vessels within those limits know that they must obey. At a spot close by that where this particular ship was stranded, namely, on the Cardiff flats, there is a very large anchorage for vessels of comparatively small size, and the restriction as regards casting over ballast is strictly enforced. This is a rule which any person arriving at or leaving the port of Cardiff in the ordinary course of navigation is bound to observe, and for all commercial purposes that spot must, I think, be taken to be within the limits of the port. The port may extend much further than that, and no doubt for fiscal purposes it does extend very much further. Whether for commercial purposes or business purposes it extends beyond the limits I have referred to, it is not material to inquire on the present occasion. It is sufficient to say that the spot where the *Garston* was stranded is within the port as it is understood for commercial purposes.

BOWEN, L.J. The question is whether the place where this vessel met with her disaster is within the port of Cardiff, having regard to the document in which the expression "last port," which we have to construe, is used? I will not attempt to give a complete definition of the meaning of this word "port," in the popular, commercial, or any other sense; but I think that, at all events, it is clear that we must construe the word in the sense in which shipowners or charterers would naturally use it in such a document as a charterparty, unless there be anything special in

the charterparty to indicate that the word is used in a different sense. Therefore, we must see what, in the ordinary language of business men, who are concerned with the letting of ships, and the exporting and importing of cargoes, is the meaning of the word "port." Charterers of ships are concerned, not merely with English ports, but with foreign ports. It is, therefore, obvious that the word "port," as used by them, cannot be treated as a term which is capable of any very rigid definition. If we were dealing only with English ports, we know that an English port is, in theory at all events, created by the Crown. The creation of a port is part of the prerogative of the Crown, and a port has privileges which arise either from prescription or from grant; and, in order to ascertain the limits of an English port, you would naturally look for evidence, either in some document emanating from the Crown, or in some usage or reputation of the place, and you would expect to find some fixed boundaries. Of course, the same kind of definition would not apply to foreign ports, and it is obvious, therefore, that we are dealing with a word which has not a fixed sense. If you found in a commercial document that certain acts were to be performed within the limits of a borough, you would know that the word "borough" is a term which has a fixed sense, but no one has ever defined the word "port" in a fixed sense of that kind. There are, however, several matters which you must bear in mind in construing the term "port" for business purposes. In the first place, you would have some regard to the limits imposed by the document (if there be one) which created the port. I do not say that that would be necessarily decisive as to the use of the word by business men. Even if the port was created by charter or grant, men of business do not always observe the strict limits of the port as originally defined by the charter or grant. But, at all events, if there was such a document, one would wish to look at it as one of the matters to be attended to. Still more should one attend to the natural configuration of the coast, and the character of the ground in question. That must be very material, because after all a port is created for the purpose of the exporting and importing of goods, and for the vessels which carry the goods.

Another matter which ought to be considered is the authority

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exercised, and the limits within which that authority is exercised, not for fiscal purposes, but for purposes connected with the loading and unloading, the arrival and departure, of ships; the mode in which the business of loading and unloading is done, and the general usage of the place. Taking all these things together, you must make up your mind in each particular case as to the sense in which shipowners and charterers would be likely to intend to employ the term "port." It becomes really, therefore, a question of fact. Now, in the present case, we have, in order to enable us to draw a correct inference as to what are the limits of the port of Cardiff in the business sense, the chart to which the Master of the Rolls and Baggallay, L.J., have alluded, we have the history of the artificial cut, and the character of the ground on each side of it, which, to my mind, has a very important bearing on the case. We have also the witness whose evidence has been commented on by my learned Brethren. The pilotage by-laws, again, seem to me important as defining the limits of the port for business purposes. I do not think that the local Acts of Parliament relating to the Bute Docks in any way assist the appellants; I think they leave the matter in ambiguo, and do not really decide it one way or the other.

On the whole case I have formed a very strong opinion that, at all events, north of the Penarth pier is within the port of Cardiff. I do not wish to go further than is necessary for the decision of the present case, but, unless my view should be changed by further argument, I should certainly be inclined to stretch the port of Cardiff further in the direction which the Master of the Rolls has indicated. But I reserve to myself the right to consider that question when it shall arise for decision.

Appeal dismissed.

Solicitors for plaintiffs: *Gregory, Rowcliffes & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for defendants: *Trinders & Romer.*

W. L. C.

[IN THE COURT OF APPEAL.]

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Aug. 11.

THE ASSESSMENT COMMITTEE OF THE ALTRINCHAM UNION *v.* THE CHESHIRE LINES COMMITTEE.

Poor-rate—Rateable Value—Occupation under Statutory Restrictions—Railway Company—Running Powers—Rent fixed by Special Act—Private Act—Construction.

A private Act of Parliament will be construed more strictly than a public one as regards provisions made by it for the benefit of the persons who obtained it, but, when once the true construction is ascertained, the effect of a private Act is the same as that of a public Act.

The special Act which authorized the making of a railway by the C. company, provided that the L. company should have the right to run their traffic over a part of the line, on payment of a fixed annual rent to the C. Company. The rent was much less than the actual value of the traffic passed over that part of the line by the L. Co. :—

Held, that the C. Company could not be rated for poor-rate in respect of that traffic at a higher sum than the fixed rent.

APPEAL from an order of a Divisional Court of the Queen's Bench Division (Lord Coleridge, C.J., and Smith, J.) quashing an order of quarter sessions, which confirmed a rate and assessment made by the assessment committee of the Altrincham Union, in respect of a railway belonging to the Cheshire Lines Committee.

The facts were stated in a special case, as follows: By the Stockport, Timperley, and Altrincham Junction Railway Act, 1861 (24 & 25 Vict. c. clxxv.), a company was incorporated for the purpose of making a railway called the Stockport, Timperley, and Altrincham Railway. All the powers conferred by this Act, and the railway which was constructed under them, became afterwards vested in the Cheshire Lines Committee, a body of persons incorporated by Act of Parliament. Sect. 59 of the Act of 1861 provided: "The company shall permit the London and North Western Railway Company to work over and use, with engines and carriages of every description, and for all through traffic (local traffic of the Stockport, Timperley, and Altrincham Company being excepted, but passengers to and from the London and North Western Company's lines to and from any intermediate station

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to be considered as through traffic) the portion of the railway by this Act authorized which lies between Northenden Road, or other authorized junction of the London and North Western Railway Company's line with the railway by this Act authorized, and the termination of such railway at Timperley, and the branches there, and the stations, sidings, watering-places, machinery, works, and conveniences belonging thereto, or connected therewith, upon payment of such tolls and other sums as may from time to time be agreed upon between the two companies, or, as, failing agreement, shall from time to time be settled by arbitration under the provisions of the Railway Companies Arbitration Act, 1859: Provided always, that the London and North Western Railway Company shall have the option, on giving three months previous notice, at any time within five years from the opening of the railway by this Act authorized, to commute such tolls and other sums for a fixed payment of £2500 per annum." Within the five years the London and North Western Railway Company gave due notice that they would pay £2500 per annum as a commuted toll, and that sum had been paid by them to the Cheshire Lines Committee since the date of the notice. The London and North Western Company exercised the running power over about four miles of the line of the Cheshire Lines Committee, over most of which that Committee also ran their own traffic, but there were thirty-eight chains over which the Committee did not run any traffic. On the 25th of October, 1882, a new valuation list for the township of Altrincham was approved by the assessment committee of the union of Altrincham, and in it the Cheshire Lines Committee were assessed in respect of the said four miles of railway upon the value of the actual traffic passed over their line by the London and North Western Company, less the usual deductions, leaving the sum of 1500*l.* per mile as the rateable value in respect of that traffic. A rate was afterwards made for the township in conformity with the list. The Cheshire Lines Committee objected to the assessment, on the ground that it was made on a wrong principle, and appealed to the court of quarter sessions, who confirmed the rate and assessment, subject to a special case for the opinion of the High Court. No difference had arisen as to the principle on which the line of the Cheshire Lines

Committee should be rated in respect of their own traffic, nor was it contended that the above-mentioned thirty-eight chains ought to be rated in respect of any traffic other than that of the London and North Western Company.

The special case stated the above facts, and it further stated as follows: "The Cheshire Lines Committee contend, that the provisions of the Act of 1861 contain the only authority under which the committee can carry on the undertaking of the said railway; that one of the provisions of the said Act is, that the London and North Western Company are to possess at their option running powers over the said four miles of line for the payment of £2500 per annum; and that, therefore, the committee are only rateable for the rent which a hypothetical tenant would give for the said four miles of line, subject to the express provisions of the aforesaid Act, and the same restrictions as those under which the committee hold, and not for the rent which a tenant entirely unfettered might give; that, in short, the rateable value must be based upon the profits which can be actually earned in accordance with the terms of the Act under the powers of which the railway was constructed, and not upon the profits which might be earned were that Act not in existence; and that, for these, amongst other reasons, as to the London and North Western Company's traffic, they are only rateable upon the whole four miles of line to the extent of the 2500*l.* a year which they so receive from the said company. The assessment committee contend that the Cheshire Lines Committee are rateable in the ordinary way upon the value of the actual traffic passed over the line by the London and North Western Company, less the usual deductions."

The Divisional Court held that the contention of the Cheshire Lines Committee was right, and quashed the order of the quarter sessions.

The assessment committee appealed.

July 3. *Henn Collins, Q.C.*, and *F. Marshall* (*McIntyre, Q.C.*, with them), for the appellants. The actual rent of 2500*l.* which the defendants receive from the London and North Western Company is

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not the true annual value of the line for rating purposes; the line is capable of earning, and does in fact earn, a larger profit, though the defendants have debarred themselves from receiving more than 2500*l.* The principles which govern cases of this kind are clear: (1.) Where land is capable of being beneficially occupied, but the actual occupier has diverted the whole or a part of the profits to some other person, the land must be rated at the amount of profit which would be produced in the absence of such a diversion; (2.) If land is absolutely incapacitated by statute from earning more than a certain amount of profit, that sum is the measure of the value for rating purposes. The question is, which of these two principles governs the present case. The Act which fixes the amount of the rent payable by the London and North Western Company is a private Act, and such an Act is in the nature of an agreement between the parties affected by it—a compromise embodied in an Act of Parliament. This provision was obviously introduced into the Act in order to buy off the opposition of the London and North Western Company to the making of the defendants' line. It is of no greater force as regards the public than a private bargain between two corporations, and in such a case the value fixed by the parties would not be conclusive for rating purposes: *South Eastern Ry. Co.* v. *Overseers of Dorking.* (1) It is true that the two companies could not get rid of the agreement without an Act of Parliament, but still it is not like a public Act; it only settles the rights of the parties inter se.

[BRETT, M.R. If the line were put up for sale, would any one give more for it than the value of a rent of 2500*l.*?]

That would apply equally to a lease of valuable land by agreement at a peppercorn.

[BRETT, M.R. Your argument comes to this, that there is no difference between a private Act and an agreement.]

That this is the true view of the effect of a private Act is shewn by *Dawson* v. *Paver* (2); *East London Ry. Co.* v. *Whitechurch.* (3) There is, therefore, no statutory incapacity of the land to earn more than 2500*l.* a year. There is nothing binding the public to

(1) 3 E. & B. 491. (2) 5 Hare, 415, 433, 434.
(3) Law Rep. 7 H. L. 81, 89.

take that to be the value of the property. The defendants, no doubt, cannot obtain more from it in money, but they must have received an equivalent in some other way, or they would never have agreed to give up that which is worth 6000*l.* a year for 2500*l.*

[BAGGALLAY, L.J. That may have been the full value at the time.]

The nature of what is called "statutory incapacity" of land to earn more than a fixed amount is shewn by *Mersey Docks* v. *Cameron* (1); *West Bromwich School Board* v. *Overseers of West Bromwich* (2); *The Queen* v. *London, Brighton, and South Coast Ry. Co.* (3): it is not necessary that the occupation should be beneficial to the occupier. The case is substantially the same as if the companies had obtained power by statute to enter into an agreement, and had afterwards entered into an agreement to the effect of the provision which is contained in the Act. If this had been done, the agreement would clearly not have been conclusive as to the rateable value. The case is distinguishable from *Corporation of Worcester* v. *Droitwich Assessment Committee.* (4) There the Act was a public one.

Sir F. Herschell, Q.C. (*Clement Higgins* and *Edwardes Jones*, with him), for the respondents. But for the Act the land would not have been worth anything like 2500*l.* a year. It is the Act which authorized the making of the railway, and the Act at the same time limits the amount of profit which can be received from it by the Cheshire Lines Committee. The Act has given the land its value, and the appellants want to take the benefit of the Act without its burden. The true test of value is, what would a hypothetical tenant give for the land with the railway on it, and the right to receive the rent? In giving power to make the railway the legislature have imposed this condition. So long as the Act is in force, no occupier of the land can receive more than 2500*l.* a year for it. That, therefore, is the maximum value for rating purposes. The London and North Western Company may be rated in respect of their adjoining line for the improved value given to it by reason of their right to run over the respondents'

(1) 11 H. L. C. 443.
(2) 13 Q. B. D. 929.
(3) 15 Q. B. 313.
(4) 2 Ex. D. 49.

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line for so low a rent. They cannot be rated in a parish in which they are not occupiers. *Great Western Ry. Co.* v. *Overseers of Badgworth* (1) shews that the defendants ought not to be rated for more than 2500*l.* It is like the case of an Act fixing a maximum amount of tolls to be levied.

Henn Collins, Q.C., in reply. A provision fixing maximum tolls affects the public generally, and in such a case it may be said, as in *West Bromwich School Board* v. *Overseers of West Bromwich* (2), that the Act has "struck the line with sterility" beyond the amount of the fixed rent. The value of the traffic of the London and North Western Railway Company which is passed over this line will be entirely lost for rating purposes unless the defendants are rated in respect of it.

Cur. adv. vult.

Aug. 11. (3) LORD ESHER, M.R. The question is, whether the assessment of a portion of the defendants' line of railway should be confined to the sum of 2500*l.*, which they receive from the London and North Western Railway Company for running their trains over it, or whether it ought to be placed higher, upon the ground that the property might, under other circumstances than those in which it actually is, or in other hands, be of a greater annual value than 2500*l.* By virtue of a private Act of Parliament the property never can, so long as that Act lasts, be of any greater annual value than 2500*l.*, either to the persons in whose hands it now is, or to anyone else. It was admitted in argument that, if the Act had been a public one, the property could not be valued at more than 2500*l.* a year. The property would, to use a phrase which, although it is picturesque, is not, I think, a very inaccurate one, have been "struck with sterility" by the Act beyond the value of 2500*l.*, and the only real point in the case is, whether the result is different because the Act is a private and not a public one.

Now it is quite true that there is some difference between a private Act of Parliament and a public one, but the only differ-

(1) Law Rep. 2 Q. B. 251.
(2) 13 Q. B. D. 943.
(3) Between the hearing of this appeal and the delivery of judgment, Sir W. B. Brett, M.R., was created a peer by the title of Baron Esher.

ence which I am aware of is as to the strictness of the construction to be given to it when there is any doubt as to the meaning. In the case of a public Act you construe it keeping in view the fact that it must be taken to have been passed for the public advantage, and you apply certain fixed canons to its construction. In the case of a private Act, which is obtained by persons for their own benefit, you construe more strictly provisions which they allege to be in their favour, because the persons who obtain a private Act ought to take care, that it is so worded that that which they desire to obtain for themselves is plainly stated in it. But, when the construction is perfectly clear, there is no difference between the modes of construing a private Act and a public Act, and, however difficult the construction of a private Act may be, when once the Court has arrived at the true construction, after having subjected it to the strictest criticism, the consequences are precisely the same as in the case of a public Act. The moment you have arrived at the meaning of the legislature, the effect is the same in the one case as in the other.

Having arrived, therefore, at the conclusion that this Act of Parliament, though it is a private Act, has placed the property in question in this predicament, that, so long as that Act is in force, it cannot be of greater annual value than 2500*l.*, in whosesoever hands it may be, the result seems to me inevitable that it is, within the meaning of the phrase which I have quoted, "struck with sterility" by the Act to any greater extent than 2500*l.* a year. Therefore the judgment appealed from must be affirmed.

I decide the case upon a clear, distinct, and positive rule of law.

BAGGALLAY, L.J., concurred.

BOWEN, L.J. I am of the same opinion, and I have really nothing of importance to add.

We must construe the Act to the best of our ability, and see whether it really makes the occupation one which never can be beneficial in anyone's hands, except to the extent indicated by the sum reserved as rent.

In this case I think that the statute, which has created the

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right to make this railway, has in the same breath fixed its value for all time, and has enacted that, beyond that value, the land shall be for ever sterile in the hands of anyone. Therefore, a logical application of the principle, which relieves from rateability the barren rock, relieves from rateability quo usque land the value of which is permanently fixed by statute in whosoever hands it may be.

Some cases have been cited which are really distinguishable from the present. In the creation of a right like this, given to one railway company over the line of another, when two railway companies are negotiating with each other, one must always bear in mind the distinction between the cases of the buyer and the seller, or of the lessee and the lessor, of the right. It may well be that the company which acquires the right to run over the line of the other, and pays the sum fixed by statute for the privilege, really acquires an occupation of the land far more beneficial to it than the sum which it pays for it. In such a case it could not be said that in every event that sum must be taken as the limit of the value of the land in the purchaser's hands, provided that he had any occupation of it. Again, it might well be that the sellers of such a right could not afterwards insist that the value of what they sold was the simple parliamentary sum which they were to receive for it, for they might obtain other advantages, if not in money, in kind, which were capable of being valued. But, in a case like the present, in which in everybody's hands the land has a value fixed for all time, then the lessors who can never get, and whose future assigns or successors can never get, anything more than that particular sum, are entitled to say that beyond that sum the land can never be rated.

Appeal dismissed.

Solicitors for appellants: *Bower, Cotton, & Bower, agents for Nicholls, Harris, & Lindsell, Altrincham.*

Solicitors for respondents: *Cunliffes & Davenport, agents for Lingards, Manchester.*

W. L. C.

[IN THE COURT OF APPEAL.]

1885
June 19.

Ex parte MILNER. *In re* MILNER.

Bankruptcy—Composition Arrangement—Preference of some Creditors—Fraud.

The essence of a composition arrangement between a debtor and his creditor is equality between the creditors, and consequently a creditor who has executed a composition deed is entitled to repudiate it, if he afterwards discovers that other creditors have been induced to execute the deed by means of a secret bargain for a payment to them in excess of the composition, even if the bargain was made after his own execution of the deed.

This principle applies even if the additional payment is to be made at the expense of a third person, provided that the bargain is made with the debtor's knowledge, and it applies whether the composition arrangement is made under the provisions of a statute or not.

APPEAL from an order of Mr. Registrar Hazlitt, dismissing an application by Edward Milner that a bankruptcy notice, which had been served on him by P. G. Townend, might be set aside.

Edward Milner, who was a surgeon, being in pecuniary difficulties, summoned a meeting of his creditors. The meeting was held on the 19th of September, 1884. The debtor then stated that his debts amounted to 40,000*l.*, and that his assets were of doubtful value. The meeting was adjourned to the 26th of September, and at the adjourned meeting the following resolution was passed:—"That the debtor enter into a proper deed to secure one-half of his future income for his creditors, undertaking as speedily as possible to pay them a sum equal to 10*s.* in the pound, the undersigned agreeing to recommend the acceptance of the above; and further, that, if such dividend be paid within eight years, a discharge be given. The terms of the deed to be settled by a committee to be appointed for that purpose." This resolution was signed by some of the creditors. In accordance with the resolution a committee was appointed, and a deed was prepared with their approval, which bore date the 15th of October, 1884. The deed purported to be made between Milner of the first part; E. C. Engelbach, C. Harrison, and A. E. Skinner, as trustees, of the second part; and "the several persons, companies, and firms who at the date hereof are or claim to be creditors of the debtor, or who would be entitled to prove under an adjudication

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of bankruptcy against the debtor founded on a petition filed on the day of the date of these presents, and whose names and seals are set and affixed in the schedule hereto, and hereinafter called 'the creditors' of the third part." The deed contained a recital of the resolution passed at the meeting, and a recital that the deed had been settled by a committee duly appointed by the creditors, as a proper deed to be executed in pursuance of the resolution. And it was thereby witnessed that, in pursuance of the resolution, and in consideration of the covenants thereinafter contained on the part of the debtor, the creditors respectively did thereby grant unto the debtor license thenceforth, until the 31st of December, 1892 (unless the license should be sooner avoided by virtue of the provisions thereinafter contained), to exercise and practise his profession of a surgeon, and agreed with the debtor that they respectively would not, during the continuance of the license, sue, attach, impede, or molest the debtor, his estate or effects, for or in respect of any debt or demand provable or claimable under the deed, and that the deed (unless the license thereinbefore expressed to be granted should be sooner avoided as aforesaid) might be pleaded as a defence to any action or other proceeding which might be brought, instituted, or taken by or on behalf of any of the creditors against the debtor, or his estate or effects, in breach of this covenant: Provided always, that, in case at any time during the continuance and operation of the deed the debtor should commit an act of bankruptcy, or should make, or endeavour to make, any arrangement with his creditors whose debts were incurred subsequently to the date of the deed for the satisfaction of the debts due to them respectively by payment of less than the amount of such debts, or should commit any breach of any of the covenants or agreements on his part in the deed contained, or in case the sums received by the trustees under the provisions thereinafter contained should not in any one quarter of a year amount to the sum of 200*l.*, it should be lawful for the trustees in writing to revoke the license thereinbefore contained, and thereupon the license, and every covenant on the part of the creditors in the deed contained, so far as the same tended to restrain them respectively from suing for and recovering their several debts, claims, or demands, should determine and be

absolutely void, and the creditors respectively should thenceforth be at liberty to sue for and recover the full amount of their respective debts, claims, and demands, except so far as they might have received the same, or any moneys on account thereof, by virtue of the deed or otherwise. And it was further witnessed that, in consideration of the license, covenant, and provisions therein contained on the part of the creditors, the debtor, as beneficial owner, did thereby assign unto the trustees all his book and other debts, and all his real and personal estate and effects (except the utensils used by him in his profession or business, and the necessary wearing apparel and bedding of himself, his wife, and children), To hold unto the trustees, on trust to sell, call in, collect, and otherwise convert into money all the premises, and to stand possessed of the proceeds on the trusts thereinafter declared. And it was further witnessed that, for the same consideration, the debtor thereby covenanted with the trustees: (1.) Forthwith to make out an account of all the book and other debts then due and owing to him, and the names and addresses of the persons from whom the same were due, and of all his estate and effects, real and personal, and of the several charges and incumbrances affecting the same, and to deliver such account to the trustees; (2.) Forthwith to make out a statement in writing of the names and addresses of his creditors, and the amounts of the debts due to them respectively, and the securities held by them respectively for their debts respectively, and to deliver such statement to the trustees; (3.) Thenceforth, until the 31st of December, 1892, unless the license thereinbefore contained should be sooner revoked by virtue of the provision thereinbefore contained, or the debtor should sooner obtain his discharge under the provisions therein contained, to exercise and practise his profession of a surgeon to the best of his ability, and to devote thereto his whole time and attention; (4.) From time to time during the continuance of the deed, as he should receive moneys in respect or on account of the gross profits and earnings of his profession, to pay to the trustees, or the receiver appointed by them as thereinafter mentioned, or permit them or him to receive, one moiety of all such moneys; (5.) During the continuance of the deed to permit some person nominated by the trustees to reside in the house in

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which he should carry on his profession, and to have the management and superintendence of the profession carried on by the debtor; (6.) During the continuance of the deed to keep proper accounts; (7.) From time to time to permit the trustees and the receiver appointed by them to examine the accounts; (8.) From time to time during the continuance of the deed to do all acts which the trustees might require to enable them to effect a policy on the debtor's life; (9.) Not to do or suffer anything whereby any creditor of the debtor should or might obtain any security for his debt, or any preference or priority of payment thereof. And it was further witnessed that, in consideration of the premises, it was thereby agreed and declared between and by all the said several parties thereto (inter alia): (1.) That the trustees might, at the expense of the trust funds, effect any policy on the life of the debtor, and should hold all moneys which should come to their hands under or by virtue of any such policy on the trusts thereinafter declared of moneys coming to their hands by virtue of the deed; (2.) That the trustees might, at the expense of the trust funds, employ a person to manage and superintend the business of the debtor, and to receive the moneys receivable by the trustees by virtue of the deed; (3.) That all the moneys which should come to the hands of the trustees by virtue of the deed (therein referred to as "the trust moneys") shall be applied by the trustees, in the first place, in paying costs and expenses as therein mentioned, and, in the next place, in payment in full of all the debts and liabilities of the debtor provable or claimable under the deed, which, if the estate were being administered in bankruptcy, would be payable in full or in priority to his other debts and liabilities; and, in the next place, so far as the trust moneys would extend, in or towards paying rateably, without preference or priority (otherwise than as aforesaid) to the persons for the time being entitled to receive the same respectively, at such time and times and in such manner as the trustees should direct, a dividend of 10s. in the pound in the whole on the several and respective debts due from the debtor to the creditors which should be provable under an adjudication of bankruptcy against him, founded on a petition filed on the day of the date of the deed, and any surplus was to be paid to the debtor. (4.) The

trust moneys should be administered and distributed as nearly as circumstances would admit (but having regard to the provisions of the deed) as the estate of the debtor would have been administered if he had been adjudicated a bankrupt on the day of the date of the deed on a petition filed on the same day. (7.) Each of the creditors before becoming entitled to any dividend should prove his debt as in bankruptcy. (11.) If any dividend should be made before any creditor should have executed the deed, the trustees should retain the rateable dividends of every such creditor, and pay the same to him after he should have executed the deed. (12.) If and when before the 31st of December, 1892, and during the continuance of the deed, all the debts and liabilities of the debtor provable or claimable thereunder which, if his estate were being administered in bankruptcy, would be payable in full or in priority to his other debts and liabilities should have been fully paid and satisfied, and a dividend of 10*s.* in the pound should have been paid to the other creditors on the respective amounts of their respective debts and claims provable or claimable as aforesaid, the debtor should be thenceforth absolutely released and discharged from the debts and claims of the creditors provable or claimable as aforesaid, and the deed should accordingly thereafter operate and be pleadable as a defence to any action which the creditors respectively might at any time thereafter bring against the debtor for or on account of their respective debts. The deed was executed by the debtor, the trustees, and a number of the creditors. Among the creditors who executed it was P. G. Townend. Several of the creditors, who executed the deed after he had done so, did so after having received from the debtor's brother payments on account of their debts, in addition to the 10*s.* in the pound. These payments were made to them, with the knowledge of the debtor, for the purpose of inducing them to execute the deed. Townend, on discovering these facts, issued a bankruptcy notice against the debtor, founded on a judgment debt in respect of which he had executed the deed. This was the notice which the Registrar refused to set aside. The debtor appealed.

Cooper Willis, Q.C., and *F. Cooper Willis*, for the debtor. The

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payments made by the debtor's brother, even if they were made with the knowledge of the debtor, were not made with the debtor's money, and consequently no injury was done to the other creditors. No false representation was made to Townend to induce him to execute the deed; he admits that he made no inquiry whether the other creditors were coming in under the deed, though he believed that they were. Payments made in excess to some creditors will not invalidate a composition arrangement, unless they were made in pursuance of a previous agreement: *Carey* v. *Barrett* (1). At any rate, after a creditor has executed a composition deed he cannot avoid it because a payment in excess of the composition was subsequently made to some other creditor, unless there was some agreement, expressed or implied, that no creditor should receive more than the composition.

Herbert Reed, for Townend. It is clear from the evidence that there was some previous agreement with the creditors who obtained these payments in excess. In order that a composition arrangement should be binding there must be perfect good faith. The essence of the arrangement is equality between the creditors. Everyone of the creditors agrees to suffer a certain amount of loss—to relinquish a part of his debt—in consideration of the other creditors doing the same. The consent of each creditor is a consideration for the consent of the others. If any creditor enters into a secret bargain that he shall receive more than the others, he commits a fraud on them, which entitles them to repudiate the arrangement. It is immaterial that the excessive payment is made by a third party, so that the debtor's assets are not diminished, if it be made with the knowledge of the debtor: *Knight* v. *Hunt* (2); *Mallalieu* v. *Hodgson* (3); *Dauglish* v. *Tennent* (4); *Ex parte Barrow*. (5) In *Dauglish* v. *Tennent* (4) the composition was a statutory one under the provisions of a statute of New South Wales, but the same principle applies to a common law composition. The statutes did not alter the nature of the agreement between a compounding debtor and his creditors; they only enabled a specified majority of the creditors to bind the

(1) 4 C. P. D. 379.
(2) 5 Bing. 432.
(3) 16 Q. B. 689.
(4) Law Rep. 2 Q. B. 49.
(5) 18 Ch. D. 464.

minority. *Dauglish* v. *Tennent* (1) shews that a creditor who has executed a composition deed is entitled to treat the deed as void, if after he has executed it a preferential payment is made to another creditor.

[BRETT, M.R:—The question is whether, when a creditor signs the deed, his signature is intended to bind him absolutely at the time when he affixes it, or only provisionally in case the other creditors come in. In the one case, you must look at the state of things when the signature is affixed; in the other, at the state of things when the other creditors come in.]

The bargain is that there shall be equality between all the creditors who come in and execute the deed.

Cooper Willis, Q.C., in reply.

BRETT, M.R. The debtor was indebted to a number of creditors, and, irrespectively of any proceedings in bankruptcy instituted either by himself or by any of his creditors, an arrangement was entered into between him and certain of the creditors who met together by his invitation. The arrangement was that they, and any other creditors who might adopt what they had done, either by signing the deed which was to be executed or in some other way, would respectively accept a composition of 10*s.* in the pound upon their debts, if it was paid within a certain time, and that, on payment of the composition, they would give the debtor a release from their claims. The arrangement was to be carried out by means of a deed which was to be executed by such of the creditors as should choose to execute it. The arrangement, not having been entered into under the provisions of any statute, could only bind those creditors who chose to assent to it. The question is, what is the effect of such a deed as between a debtor and those of his creditors who execute it or assent to it? The evidence, I think, justified the Registrar in finding these facts—that the debtor met a certain number of his creditors who resolved to accept a composition of 10*s.* in the pound in discharge of their claims if it should be paid within eight years; that certain others of the creditors came into the arrangement, and either signed the deed which was prepared to carry it out, or in some other way adopted

(1) Law Rep. 2 Q. B. 49.

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the resolution. The respondent, without any unfair or improper conduct, joined in the resolution and executed the deed. He was not induced to consent to the arrangement by means of any fraudulent representations made to him by the debtor before he executed the deed. But the evidence shews that, after he had executed the deed, several other creditors were induced to execute it only because the debtor's brother agreed to make them additional payments on account of their debts, these additional payments being made in order to induce them to execute the deed. They received these payments from the debtor's brother, and then they executed the deed. The respondent became aware of this transaction, and he now contends that, notwithstanding that those creditors executed the deed after himself, not only cannot they insist on the arrangement being carried out, but that, they having, with the knowledge of the debtor, executed the deed upon such terms, the arrangement may be treated as void by any of the creditors who originally acceded to it and who chooses now to avoid it. It is not denied that, if this deed had been entered into under the provisions of some statute, such a secret agreement with some of the creditors would avoid it as regarded every one of the other creditors who elected no longer to be bound by it. The question is whether the deed is not equally void under such circumstances, though it was not entered into under the provisions of any statute. The first question is, whether the deed could be avoided if the additional payment had been made by the debtor himself. In my opinion it is of the very essence of a composition of this nature that all the creditors who come in under it oblige themselves to each other, and the debtor obliges himself to every one of them, that, so far as he is concerned, all of them shall come in upon a footing of equality. This equality is implied by law from the very nature of the transaction, and, if it is carried out by means of a deed, then, unless there is something in the deed which is plainly to the contrary, equality between the creditors becomes an implied condition of the deed, and if any breach of this condition is committed by the debtor the deed becomes voidable by every creditor who has executed it. It appears to me that this is a general principle which is applicable to deeds entered into independently of any statute, equally with deeds entered into under the provisions

of a statute. The grounds of the principle are fully set forth in *Dauglish* v. *Tennent*. (1) There Mellor, J., said (p. 54): "To put the case on a broad ground, it is an agreement between the debtor and each creditor that they are contracting" (I will go further and say they are contracting with each other) "on terms of equality as to each and all, and, if by a secret bargain some creditors have an advantage over other creditors, it is a fraud upon those who must be presumed to have signed the deed upon the understanding that all the creditors should be placed on the same footing." And Lush, J., said (p. 54): "It must be taken that every creditor who signed the deed stipulated for good faith between the debtor and the whole of the creditors" (I would add, and amongst themselves) "and that the release was only to take effect if and when the requisite majority of the creditors should have bonâ fide executed the deed; and, if the execution of some was obtained by bribery, then it is not such an execution of the deed as was contemplated." This seems to shew that one of the grounds upon which the principle rests is, that the other creditors would not enter into such an agreement if they were not to take it for granted that all the creditors who enter into it are to stand on a footing of absolute equality. If this is not so, they are deceived. Another ground is stated by Lord Kenyon in *Cockshott* v. *Bennett* (2), where he says: "The contract in the present case affected all the other creditors, by rendering abortive all that they had intended to do for the bankrupt in compounding for their debts."

Equality among the creditors is an implied condition of such an arrangement, and, if the arrangement is carried into effect by a deed, this becomes an implied condition of the deed, and, if this condition is not carried out, any creditor who has executed the deed is no longer bound by it, even if the breach of the condition takes place after his execution. Then the case of *Knight* v. *Hunt* (3) carries the principle still further, for it decides that it is immaterial whether the bribery is to be carried out at the expense of the debtor or not; if one of the creditors derives an advantage from some other person than the debtor, still he has broken faith with

(1) Law Rep. 2 Q. B. 49. (2) 2 T. R. 763, 765.
(3) 5 Bing. 432.

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the other creditors, and they are entitled to say that they are not bound by the deed. I should hesitate to say that this would be so if the preferential payment was made without the knowledge of the debtor; but in the present case it was made with his knowledge. Though, therefore, there is no case exactly in point with the present, I think that the principle which has been applied to composition deeds entered into under the provisions of a statute is equally applicable to composition deeds entered into independently of any statutory provision. In my opinion, therefore, the respondent had a right to treat his execution of this deed as voidable, and this is what he has done. The decision of the Registrar is quite right.

BAGGALLAY, L.J. The defence of the debtor to the bankruptcy notice, which had been served on him by the respondent, is that in October last a deed of composition between him and his creditors was signed by the respondent. If this deed is unimpeachable, it is, no doubt, a complete answer to the bankruptcy notice. The question, therefore, is, whether the deed can be impeached by the respondent. The deed bears evidence on the face of it that it was prepared by a person who was well acquainted with the ordinary form of composition deeds before the Bankruptcy Act of 1849. Sects. 224 to 229 of that Act contained provisions relating to such deeds, and ss. 230 and 231 contained provisions for the offer and acceptance of a composition after an adjudication of bankruptcy. And s. 231 provided that, "if any creditor shall agree to accept any gratuity or higher composition for assenting to such offer, he shall forfeit the debt due to him, together with such gratuity or composition."

Several cases relating to these sections came before the Court in the bankruptcy of Mr. C. J. Mare. He had availed himself of the latter sections, and had given to several of his creditors bills of exchange to secure a larger composition, in order to induce them to come into the composition arrangement. He afterwards instituted suits in the Court of Chancery against those creditors to set aside the bills which he had thus given them. One of these cases was *Mare* v. *Sandford* (1), and another was *Mare* v.

(1) 1 Giff. 288.

Warner. (1) This may not have been a very honourable proceeding on his part, but he succeeded in setting the bills aside. I refer to these cases, however, only for the purpose of quoting an observation of Stuart, V.C. In *Mare* v. *Sandford* (2), he said: "That section (231) does not enact the law which makes the transaction illegal, because the law is well established already; but it imposes a penalty upon the creditor who shall have consented to accept, on a private bargain, a gratuity or a secret advantage of that particular kind." I may say, that, as long as I can recollect anything of composition arrangements, the acceptance by a creditor who was a party to such an arrangement of any bonus disentitled him to his dividend, and I think also invalidated the whole transaction. What is the principle of this rule? It does not depend upon any statute law relating to bankruptcy; it is a general principle of law applicable to all deeds of this kind. It was well explained in *Dauglish* v. *Tennent* (3) by Lush, J., in the passage which the Master of the Rolls has read. I cannot see any reason why this principle should not apply to all deeds of this kind; it does not depend upon the provisions of any statute. The present deed was not entered into under any statutory provisions, and we must deal with it on general principles. I am satisfied that its execution by some of the creditors was brought about by a payment made to them with the knowledge of the debtor, in addition to the 10*s*. which was to be paid to the general body of the creditors, and, in my opinion, any of the creditors who was not so preferred is entitled to treat the deed as invalid.

BOWEN, L.J. I think the case must be decided on the settled principles of the common law. A man who is insolvent may enter into any arrangement he pleases with his creditors, provided that he does not infringe the provisions of any statute or the rules of ordinary good faith. But in an ordinary case what does a simple composition with creditors mean? It means that each of the creditors agrees to forego a part of his debt, the consent of each creditor who comes into the arrangement being a consideration for the consent of the others. It follows that it is of the very

(1) 3 Giff. 100. (2) 1 Giff. 296.

(3) Law Rep. 2 Q. B. 49.

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essence of such a transaction that the creditors who take part in the scheme act upon the faith and understanding that they are all coming in upon terms of equality, and if a deed is prepared to carry out this equal distribution, every creditor who executes it does so on the faith that there is no private bargain with any of the other creditors which will destroy this equality. If there is any private agreement that one of the creditors is not to be dealt with upon this equal footing, but is to receive a preference, that is a breach of faith, and, if the debtor is aware of it, it strikes at the root of the deed, and entitles any creditor who has been thus deceived to treat it as void.

Solicitors for appellant: *Bird & Moore.*
Solicitors for respondent: *Ross & Co.*

W. L. C.

Distinguished. Re BRITISH FOLDING BED CO. [1948] 2 All E.R. 216.

Aug. 10.

IN RE SINCLAIR. EX PARTE PAYNE.

Bankruptcy Petition—Money paid by Debtor to his Solicitor to oppose Petition—Adjudication—Title of Trustee.

Money bonâ fide paid by a debtor to his solicitor to defray counsel's fees and other legal expenses in opposing proceedings in bankruptcy that have been commenced against him, cannot, should adjudication follow, be recovered from the solicitor by the trustee in bankruptcy, even although the solicitor knew of the acts of bankruptcy on which the proceedings were based.

ON the 9th of March, 1885, W. Sinclair was served with a bankruptcy petition presented against him by R. Henry, one of his creditors; and on the 10th of March he was served with an interim receiving order, obtained on the ex parte application of the same creditor.

W. Sinclair thereupon immediately consulted his solicitor, Mr. Norman, told him all his affairs, and the acts of bankruptcy he had committed; and, after consulting counsel, it was decided to oppose the bankruptcy petition and to apply to the Court at once to set aside the interim receiving order. Notice of motion was accordingly given, but Mr. Norman informed W. Sinclair that he should require at least 25*l.* on account of costs and counsel's fees, and between the 9th and 17th of March W. Sinclair paid Mr. Norman several small sums, amounting altogether

to 25*l.*, which he said his friends had given him to help him out of his difficulties.

The motion to set aside the receiving order failed, and, on the hearing of the bankruptcy petition, W. Sinclair was adjudicated a bankrupt on the acts of bankruptcy alleged in the petition. R. Payne was appointed the trustee in the bankruptcy, and now applied for an order that Mr. Norman might be ordered to pay him the 25*l.* which he had received from the bankrupt "with full notice and knowledge of the several acts of bankruptcy committed by the bankrupt and upon which the receiving order was made."

Aug. 4. *F. C. Willis*, for the motion. Norman was made aware of the exact financial position of Sinclair and of the acts of bankruptcy he had committed, and must have known that the motion to rescind the interim order was not made bonâ fide, and was an absolutely useless application. *Ex parte Edwards* (1) was a much harder case than this, and yet there the solicitor was ordered to repay the money.

H. Reed, for Norman. This is a case of great importance to solicitors. There must be some exceptions to the strict rule that money paid away by a bankrupt to a person, having notice of an act of bankruptcy, must be repaid. In *Ex parte Dewhurst* (2) it was held that money paid away for value by a bankrupt cannot be followed by the trustee in bankruptcy although the person to whom it was paid knew of the bankruptcy. The analogy of that case applies to this. This was money paid away for value. *Ex parte Edwards* (1) is distinguishable. There the money was paid by the debtor to the petitioning creditor's solicitor on account of the debt. Here it is paid to the debtor's own solicitor for counsel's fees and other expenses in defending him against the bankruptcy proceedings. Further, it has been held that a mere conduit pipe for the payment of money is not answerable to the trustees in bankruptcy: *Coles* v. *Wright.* (3) Here, the debtor was merely the hand to receive and pass on the money advanced by his friends to help him.

F. C. Willis, in reply.

(1) 13 Q. B. D. 747. (2) Law Rep. 7 Ch. 185.
(3) 4 Taunt. 198.

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Aug. 10. CAVE, J. There appears to be no precedent for this application. On the 23rd of March an application on behalf of the bankrupt to set aside a receiving order was dismissed. Before making the application the solicitor told his client that he should require a sum of 25*l.* to be paid to him on account of the costs of the motion, and the debtor paid him the money. No case has been referred to where the Court has interfered to make a solicitor refund money paid to him for services rendered, and if an order were to be made on such an application as this, it would be a great injustice. It is right that a man should have legal advice and assistance against a bankruptcy petition, but if a solicitor has to refund money paid to him for such a purpose a man would be left defenceless because nobody would act for him. It seems to me impossible to hold that, whenever a solicitor has received instructions to oppose proceedings in bankruptcy, does his work and is paid for his services, if the petition is ultimately successful, the money that has been paid to him by the bankrupt may be recovered from him by the trustee in the bankruptcy. It might just as well be said that if a bankrupt goes into a baker's shop, who knows that he has committed an act of bankruptcy, and pays for a loaf of bread, the trustee can recover the money from the baker. In my opinion this application must be dismissed with costs.

Order accordingly.

Solicitors: *F. W. Henry*; *G. B. Norman.*

H. L. F.

SIBLEY *v.* HIGGS.
TAPLIN, CLAIMANT.

1885
June 22.

Bill of Sale—Stipulated Time for Payment—Seven Days after Demand—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9, *and Schedule.*

A bill of sale was given by way of indemnity to the grantee on his becoming security for the payment by the grantor of a sum of money, being an instalment of a composition due by him to his creditors. The grantor agreed that he would pay the said sum of money to his creditors on a given day, and the bill of sale provided that if he did not pay the money on the day named, and the grantee should be obliged to pay the same, the grantor would repay to the grantee the amount within seven days after demand in writing, with power in default to the grantee to seize and sell the goods:—

Held (on the authority of *Hetherington* v. *Groome* (13 Q. B. D. 789)), that the bill of sale did not contain an agreement to pay the money secured at a stipulated time in accordance with the form given in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, and was therefore void.

APPEAL from a decision of the County Court of Hertfordshire, holden at Watford, in favour of the claimant in an interpleader issue.

The plaintiff obtained judgment in this action, and seized certain goods in execution, which the claimant Taplin claimed under a bill of sale made by the defendant in April, 1883. This deed was made between the defendant Higgs as mortgagor and the claimant Taplin as mortgagee, and recited that the mortgagee had consented to become security and guarantee for the mortgagor in the sum of 65*l.*, being an instalment of a composition due by the mortgagor to his creditors, and in consideration thereof the mortgagor assigned certain chattels and things specifically described in a schedule "by way of security for payment of the said sum by the mortgagor to his creditors, and as security and indemnity to the mortgagee for the said sum of 65*l.*, for which he has become liable under his said guarantee." The mortgagor further agreed and declared that he would pay the said sum of 65*l.* to his creditors on the 24th of May then next; and it was provided that if the mortgagor should not duly pay the said sum on the day named, and the mortgagee should be obliged to pay the same under the guarantee, the mortgagor should "repay to the

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mortgagee the said sum of 65*l.* within seven days after demand in writing, such demand to be sent by post to last known address of the mortgagor," with a power to seize and sell the goods in default. The judgment in the county court was in favour of the claimant under the bill of sale. A rule was obtained on behalf of the plaintiff to set aside this judgment and to enter it for the plaintiff on the ground that the bill of sale was invalid and void, and that the judge ought so to have directed the jury, against which

Ball, shewed cause. This is not the case of a loan of money and a covenant to pay on demand, as in *Hetherington* v. *Groome*. (1) Here the creditors are to be paid on a fixed day, and till that day the goods cannot be touched, and then only if the mortgagee is called on to pay. This is the contingency which determines when the powers under the deed can be put in force, and the covenant even then is not to pay on demand, but within a fixed time after demand. It is submitted that under the circumstances the statute (2) has been complied with.

R. Bray, in support of the rule, was not heard.

FIELD, J. I think that the objection to this bill of sale must be held to be good; indeed, we cannot hold otherwise without differing from the decision in *Hetherington* v. *Groome*. (1) The question turns on the true construction of the new legislation contained in the Bills of Sale Act, 1882. That Act, by s. 7, restricts the right to seize personal chattels assigned under a bill of sale to certain specified cases. One of these is where the grantor

(1) 13 Q. B. D. 789.

(2) By the Bills of Sale Act (1878) Amendment Act, 1882, s. 7: "Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:—

1 If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment . . . ."

By s. 9 "a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

The form in the schedule contains these words, "And the said A. B. doth further agree and declare that he will duly pay to the said C. D. the principal sum aforesaid together with the interest then due by equal payments of £ on the day of [*or whatever else may be the stipulated times or time of payment*]."

makes default in payment of the sum or sums of money thereby secured "at the time therein provided for payment." There must therefore be a time for payment. Then s. 9 declares that a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule. The construction put on this legislation by the Court of Appeal in *Hetherington* v. *Groome* (1) is that there must appear in the bill of sale a stipulated time for payment, and that an agreement to pay the money on demand was not an agreement to pay it at a stipulated time in accordance with the form in the schedule. No doubt the language of this bill of sale is not identical with that on which *Hetherington* v. *Groome* (1) was decided. There the covenant was to pay on demand, and here it is to pay within a certain time after demand, but the same principle is applicable to each case. Another distinction was suggested, that in the present case there was no power to seize till after the 24th of May, and default by the grantor on that day in payment of the instalments of his composition, but it seems to me that circumstance makes no difference, for the language of the deed as to payment on demand makes the enforcing of the security dependent on the mere choice and volition of the grantee, and brings the case within the language of the judgment in *Hetherington* v. *Groome*. (1) The appeal must therefore be allowed.

MANISTY, J., concurred.

Rule absolute to enter judgment for the plaintiff.

Solicitor for plaintiff: *W. T. Boydell.*
Solicitor for claimant: *T. J. Broad, Watford.*

(1) 13 Q. B. D. 789.

A. M.

1885
July 20.

WELDON *v.* GOUNOD.

Practice—Jurisdiction—Foreigner out of the Jurisdiction—Service of Notice of Appointment of Receiver.

The plaintiff having obtained judgment against the defendant, a foreigner resident out of the jurisdiction, a summons was issued by leave of a judge at chambers calling on the defendant to shew cause why a receiver should not be appointed. On an application for leave to serve this summons on the defendant out of the jurisdiction:—

Held, that there was no jurisdiction to grant such leave.

In this action the plaintiff obtained judgment against the defendant, a foreigner resident out of the jurisdiction of the Court. A summons was issued by leave of a judge at chambers calling upon the defendant to attend on an application of the plaintiff for the appointment of a receiver of certain moneys which it was alleged were to be paid to the defendant. A further application was then made to Smith, J., at chambers, for leave to serve this summons on the defendant out of the jurisdiction, and this application was referred to the Court.

G. S. Bower moved for an order for leave to serve the summons, or a notice thereof, out of the jurisdiction. He admitted that there was no rule directly authorizing such an order, but contended that the principle on which the case of *Credits Gerundeuse* v. *Van Weede* (1) was decided was applicable, and that this was a stronger case; for there the foreigner had only expressed an intention to appear, while in this case, although he did not appear to the action, he was represented before the under-sheriff on the assessment of damages. He urged that this should be taken as a submission to the jurisdiction of the Court, and that unless the summons or notice was allowed to be served, the plaintiff would be deprived of the fruits of the judgment. He also cited *Beddington* v. *Beddington*. (2)

Lord Coleridge, C.J. I am clearly of opinion that this application must be refused. Primâ facie this Court has no right to order service of process out of the jurisdiction, and the cases in which it may do so are laid down in a series of rules which

(1) 12 Q. B. D. 171. (2) 1 P. D. 426.

were very carefully considered, and were intended to limit the right which the Court had assumed to serve process on foreigners out of the jurisdiction. I am unable to see any rule empowering us to make the order asked for, and it might have been thought that would make an end of the application. We are, however, asked to do what there is no direct statutory authority for, on the authority of the case of *Credits Gerundeuse* v. *Van Weede* (1), in which Pollock, B., delivered a considered judgment to this effect: that where the defendant was desirous to interplead on the ground that a foreigner out of the jurisdiction claimed and would probably sue for the goods for which the action was brought an interpleader summons obtained under Order LVII. might be served on the foreigner out of the jurisdiction. The reason for the decision is that the foreigner may, if he chooses, on receipt of the notice, put forward his claim at the proper time for determining the rights of all the parties. The decision is supported by the authority of Lord Eldon in *Stevenson* v. *Anderson* (2), and while I have no doubt both cases were properly decided, I do not see that they supply any authority for the present application. For in this case the foreigner whom it is sought to serve with notice of proceedings is making no claim to the subject-matter of any action, and there is no dispute as to any such subject-matter before the Court. What is asked here is, that the foreigner should be brought before the Court to say why a receiver should not be appointed. This is obviously a very different state of facts, and the authorities cited do not shew that under these circumstances we have any inherent power to do what is asked of us.

In *Patorni* v. *Campbell* (3), both Parke, B., and Alderson, B., expressed great doubt whether there was any right in interpleader to bar a foreigner resident out of the jurisdiction, and although, as pointed out by Pollock, B., the decision in that case proceeded on another ground, the view expressed by those learned judges is certainly of great weight. But even if on that point there may be considered to be a conflict of judicial opinion, the present case is, as I have already said, quite different, and for the reasons I have given I think this rule must be refused.

(1) 12 Q. B. D. 171. (2) 2 V. & B. 407.
(3) 12 M. & W. 277.

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WELDON v. GOUNOD.

SMITH, J. When this application was before me at chambers I asked what authority there was to support it. It was said that the decision in *Credits Gerundeuse* v. *Van Weede* (1) was an authority. I thought not, but as the point was novel I made no order, but referred it to the Court. I still think that unless we are bound by that decision there is no authority to grant this application. I certainly think the decision in that case should not be extended. The point that there is no statutory authority to issue process other than a writ of summons, does not appear to have been taken, but the ratio decidendi was that the foreigner was coming within the jurisdiction to enforce his claim, and it was desirable to anticipate him so that the matter in dispute might be determined between the parties at a proper and convenient time. The Court accordingly allowed notice of the proceedings to be given, but that decision does not cover the present case. Here the plaintiff is coming to the Court for what is now called equitable execution, and seeks on an interlocutory summons to bring the defendant, a foreigner resident out of the jurisdiction, before the Court. I am of opinion that we have no jurisdiction in such a case, and that the application must be refused.

Order refused.

Aug. 8. The application was renewed in the Court of Appeal.

THE COURT (Lord Esher, M.R., Bowen and Fry, L.JJ.), gave no decision on the question of jurisdiction, but dismissed the application on the ground that the plaintiff had failed to shew that under the circumstances of the case the order asked for was necessary.

Solicitor for plaintiff: *John Hughes.*

(1) 12 Q. B. D. 171.

A. M.

THE GREAT WESTERN RAILWAY COMPANY *v.* BAGGE & Co. 1885 July 1.

Carriers of Goods—Delivery to Consignee—Non-payment of Freight by Consignee—Liability of Consignor.

The defendants hired a trolly, and agreed with the owner to pay for the carriage both ways. The defendants delivered the trolly to the plaintiffs, to be returned to the owner, under a consignment note which stated that the defendants requested the plaintiffs to receive and forward the trolly as per address and particulars on the note, and on the conditions stated therein. The note gave the name of the owner as consignee, and in a column headed "who pays carriage" was inserted "consignee." The plaintiffs delivered the goods to the consignee, who declined to pay the freight on the ground that the defendants had agreed to pay it. In an action to recover the freight from the defendants:—

Held, that under the circumstances the defendants could not be treated merely as agents of the consignee to make the contract for the carriage of the trolly, but were themselves contracting parties, and liable to pay the freight.

SPECIAL CASE stated in an action brought in the County Court of Newbury to recover the sum of 10*l.* 6*s.* 6*d.* for the carriage of a boiler trolley from Bristol to Maidstone.

The consignment note was directed to the Great Western Railway Company, and requested them to receive and forward as per address and particulars on the note the goods mentioned, on the conditions stated on the other side. The consignment note gave the name of Ellis & Co. as consignees, and under the heading "who pays carriage" was inserted the word "consignee."

Messrs. Pickford & Co. signed the note on behalf of the defendants. Evidence was given that the margin at the right-hand side of the consignment note, headed "who pays carriage," was placed there for the purpose of instructing the company from whom they were to collect the carriage.

Messrs. Ellis & Co. refused to pay the carriage, because they had agreed with the defendants that the latter should pay it.

The defendants disputed their liability on the ground that there was no privity of contract between them and the Great Western Railway Company.

A letter from the defendants, of which the following is a copy, was put in evidence:—

"6th March, 1885.

"To the Great Western Railway Company.

"We admit that a contract existed between Messrs. Ellis & Co.

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and ourselves that we were to pay carriage of boiler trolly both ways, and we also admit that the same was duly carried, but we do not admit our personal liability to the Great Western Railway Company, considering that we admit the consignment note of Messrs. Pickford & Co., Bristol, copy of which we have this day compared with Mr. Parks and found correct, in which it states that consignee has carriage to pay."

It was contended on behalf of the plaintiffs that, notwithstanding the fact that it was an instruction to them to collect the carriage from the consignee, and notwithstanding the fact that they had failed to collect the money from the consignee, the senders were liable, because it was with them that the contract was made; also that there was no privity of contract between the company and the consignee. It was also urged that the senders had admitted their liability by the letter set out.

The learned judge of the county court held that there was no contract between the plaintiffs and defendants, and that the consignors were the agents for the consignee, and he accordingly gave judgment for the defendants.

McCullagh, for the plaintiffs, contended that the contract being made with the defendants they were liable to pay the carriage.

Spokes, for the defendants, contended that there was nothing to take the case out of the general rule that the consignor is agent for the consignee to make a contract with the carrier, who must look to the consignee for payment: *Dawes* v. *Peck* (1) and *Cork Distilleries Co.* v. *Great Southern and Western Railway Co.* (2) The statement in the consignment note amounts to an agreement that the consignee will pay, and his not doing so does not render the consignors liable: *Drew* v. *Bird*. (3) He also cited *Davis* v. *James*. (4)

LORD COLERIDGE, C.J. In this case it seems to me that the whole matter turns on the meaning of the contract. A contract was entered into between Pickford & Co. and the Great Western Railway Company, but Pickford & Co. were acting as agents for

(1) 8 T. R. 330.
(2) Law Rep. 7 H. L. 269.
(3) 1 Mood. & M. 156.
(4) 5 Burr. 2680.

the defendants, and as such they brought these goods to the Great Western Railway Company and requested them to receive them and forward them as per address, and particulars on the consignment note. The Great Western Railway Company did receive them, in fact, from Pickford & Co., but this is the same thing as if they had received them from the defendants themselves, because they received them from their authorized agents. It is true that on the consignment note, under one of the columns, "Who pays carriage?" is "the consignee." The question is, what is the effect of this contract? The consignors say: we wish to forward these goods to the consignee, who, as between us and him, has agreed to pay, forward them for us, and if you do that work for us, if the consignee does not pay there is the resulting contract that we will pay; because we have handed the goods to you, you have taken them for us and have performed the work which you undertook with us you were to perform. That, it seems to me, is the true construction of the contract, and if that be so, these rules of law, general presumptions, and so forth, have no application. In every case it must be a matter of construction of the particular contract; and the contract, it appears to me, was wrongly construed here by the learned county court judge. I do not stay to observe the reasons which he gave. I think he construed the contract wrongly, and that there is a clear contract between the defendants and the plaintiffs to pay for the carriage of these goods. It is singularly ungracious for the consignors to take the course of disputing their liability, because they admit that as between themselves and the consignee they were liable to pay, but although they admit that, they say to the Great Western Railway Company, "Sue the man with whom you have not a contract, but do not sue the man with whom you have a contract." I do not think the cases which were cited have much to do with this matter. In the case which was insisted on, *Dawes* v. *Peck* (1), it was carefully pointed out that the liability is a question of circumstances, and in that particular case the Court came to the conclusion that the contract for carriage was made with the consignee. So Lord Mansfield, in *Davis* v. *James* (2), points out that the true construction of the contract in the particular case

(1) 8 T. R. 330. (2) 5 Burr. 2680.

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was, that the consignor should pay. No doubt the general rule may be otherwise where there is nothing to shew that the contract makes the consignor liable. It may be the general rule is so, but here it seems to me that the contract made the consignors liable, and they ought to have paid, and must pay. The judgment of the county court judge must be reversed.

MATHEW, J. I am of the same opinion. The argument of Mr. Spokes came to this, that the railway company ought to have inferred from the form of this consignment note that the consignors were the agents of the consignee, that that was the true construction of the contract. It would be very awkward for the defendants if that were so, because, in point of fact, unquestionably the consignors were not the agents of the consignee, and if they induced the railway company to act upon any such impression, they would be liable, as we hold they are, but in a different way, for the fraud. It is perfectly clear here from the facts given in evidence before the county court judge that he would have been justified in drawing the inference of a contract between the senders and the carrier. There is no ground whatever for saying that the railway company concluded a contract with anyone else; and the freight therefore must be paid by the defendants.

Judgment for the plaintiffs; leave to appeal refused.

Solicitor for plaintiffs: *John White.*

Solicitors for defendants: *Radford & Frankland, for C. Lucas, Newbury.*

A. M.

SYMONS AND WIFE *v.* LEAKER AND ANOTHER. 1885 *June* 22.

Easement—Prescription Act, 2 & 3 *Wm.* 4, *c.* 71, *s.* 8—*Right of Way—Forty Years' Enjoyment—Remainderman—"Reversion expectant" on Term of Life or Years.*

Where a right of way is claimed by virtue of forty years' enjoyment under the Prescription Act, 2 & 3 Wm. 4, c. 71; the period during which the servient tenement has been vested in a tenant for life, with remainder in fee, cannot be deducted from the period of forty years' enjoyment—for the remainderman is not "a person entitled to the reversion expectant on a term" within s. 8.

APPEAL upon a case stated by the judge for the County Court of Devonshire in an action of trespass.

The female plaintiff is owner in fee simple of an estate called Dipwell, in Woodland, Devon, and the defendants are the occupiers of an adjoining farm, and as such occupiers claim the right of passing over a field called Baker's Park and part of Dipwell, to reach a field called Gullamores occupied by them. Before the 1st of November, 1883, the plaintiffs stopped up a gateway in a hedge between Baker's Park and Gullamores, which the defendants afterwards pulled down and passed to and returned from Baker's Park. This was the trespass complained of.

It appeared that in 1828 the Rev. John White, the elder, was owner in fee of the Dipwell estate, and on the marriage of his son Mathew settled the estate to the use of Mathew for life, remainder to his wife for life, and remainder to the children of the marriage. Mathew White, who survived his wife, died in April, 1883, leaving one child, the female plaintiff, who thereupon became entitled to the estate in fee.

It was contended by the plaintiffs that the enjoyment of the easement between 1828 and April, 1883, could confer no right, as during that period the servient estate was vested in a tenant for life.

The judge adopted this view.

The question for the opinion of the Court was whether in the computation of time under the Prescription Act, s. 7, the period during which the servient estate was vested in the tenant for life was to be excluded or included?

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June 16. *E. W. Byrne* (*H. D. Bonsey* with him), for the defendants. The question raised by the present case is simply whether the expression "reversion expectant" in s. 8 of the Prescription Act, 1 & 2 Wm. 4, c. 71 (1), can include an estate in remainder. There is nothing to warrant any such construction. The Act is dealing with a subject familiar only to lawyers and cannot be supposed to have used words in any other than their legal meaning. In *Laird* v. *Briggs* (2), the same point as in the present case was raised, and although it became unnecessary to decide it, yet it is clear that Jessel, M.R., was disposed to think that the word "reversion" must be confined to its strict legal meaning. The distinction between a reversion and remainder is fully explained in Williams on Real Property, 14th ed. p. 255. —"If the tenant in fee simple should grant a lease for a term of years, or for life, he does not dispose of all his interest, for in each case the grantee has a less estate than himself. Accordingly, on the expiration of the term of years or on the decease of the tenant for life, the remaining interest of the tenant in fee will revert to himself or his heirs, and during the continuance of the smaller estate which he has so granted, called the particular estate, the interest of the tenant in fee simple is called his reversion. If, at the same time with the grant of the particular estate, he should also dispose of this remaining interest, or reversion, or any part thereof, to some other person, it then changes its name, and is termed not a reversion but a remainder."

G. Pitt-Lewis, for the plaintiffs. The word "reversion" in its popular sense includes an estate in remainder, and as there is no ground for supposing that any distinction was intended by the

(1) Prescription Act (2 & 3 Wm. 4, c. 71), s. 8: Provided, that when any land or water upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof.

(2) 16 Ch. D. 440; and on appeal, 19 Ch. D. 22.

legislature between the rights of those possessed of the two different interests the word ought to be construed according to its popular meaning. So far as it can be gathered the opinion of Fry, L.J., in *Laird* v. *Briggs* (1), was favourable to this construction. Sect. 8 is loosely drawn, the word "convenient" in the first part of it, must be read "easement."

Byrne, in reply.

Cur. adv. vult.

June 22. FIELD, J. This is an appeal upon a case stated by the judge of the County Court for Devonshire. The action is for trespass on the plaintiffs' lands, and the defendants justify the trespasses as having been committed in the exercise of a right of way over the land in question. [The learned judge stated the facts from the case, and proceeded:—] The question really turns upon the construction of s. 8 of the Prescription Act, 2 & 3 Wm. 4, c. 71. Under s. 2, where a right of way has been uninterruptedly enjoyed in the manner described for the full period of forty years, the right is to be absolute and indefeasible, and in s. 8 it is provided that where the land over which the way is claimed has been held under a term of life or years exceeding three, the enjoyment during the continuance of such term is to be excluded from the computation of the period of forty years' enjoyment in case the claim is resisted within three years next after the expiration of the term "by any person entitled to any reversion expectant on the determination thereof." It is argued that the plaintiffs are not persons entitled to a reversion expectant on the determination of a term, inasmuch as the female plaintiff is entitled only to a remainder, and therefore that this action is not maintainable. There can be no doubt that in the legal sense of the words the plaintiffs' interest is a remainder and not a reversion. The plaintiffs urged that there is no ground in reason or convenience for placing remaindermen in a worse position than reversioners, and that the word "reversion" in the section may be taken to include an estate in remainder. It was also observed that the introductory part of the section is upon the face of it carelessly drawn, and that some word must be supplied in order

(1) 16 Ch. D. 440.

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to construe it properly. What is said concerning the earlier part of the section may be true, but the words "reversion expectant on the determination of a term" are quite clear, and we must follow the natural meaning of the words. As Lord Redesdale says in *Mason* v. *Wright* (1): "It is dangerous where words have a fixed legal effect to suffer them to be controlled without some clear expression or necessary implication." Reversion is a well known legal expression, and its meaning and the distinction between it and a remainder is clearly pointed out in the passage from Williams on Real Property, to which we were referred by the counsel for the defendants.

This Act of Parliament is dealing with a technical subject. The words used in it have a technical and legal meaning, and I cannot see why the words "person entitled to any reversion" in s. 8 of the Prescription Act should be construed to apply to a remainderman. I see that the Master of the Rolls in *Laird* v. *Briggs* (2) says, with respect to s. 8, "the whole of the section and the whole of the Act is of a strictly technical character from beginning to end. As far as I can see, technical words are used in their proper technical senses. The nature of the rights defined and the nature of the remedies given are all technical; and, primâ facie, it appears to me that the rule applies that technical words must have their technical meaning given to them unless you can find something in the context to overrule them. Now the words here are, 'term of life or term of years,' and 'reversion expectant upon the determination thereof' is the exact legal description of it. A reversion in law is not a remainder, the difference being that the reversion is what is left, and the remainder is that which is created by the grant after the existing possession. I am not prepared to say that I can find anything in the nature of the case or in the context which would allow me to alter the meaning of the word 'reversion.'"

It is true that this decision is not in itself binding upon me. The Lords Justices Brett and Cotton distinctly avoid giving an opinion upon the point, which they say must not be treated as decided by the judgment of Mr. Justice Fry in the Court below, who appears to have taken the opposite view, but must be treated

(1) 2 Bli. at p. 56. (2) 19 Ch. D. at pp. 33 and 34.

as left open for further consideration. But I take the same view of the 8th section as did the late Master of the Rolls. I am not at liberty to make the Act of Parliament instead of construing it, and I think I should be making the Act instead of construing it if I held that a remainderman was a reversioner within the meaning of that section. I am, therefore, of opinion that our judgment should be for the defendants.

MANISTY, J. I have come to the same conclusion. I think a good deal of weight must be given to the consideration of what was the general object of the Act. That object seems to have been to clothe with a legal right the long enjoyment of forty years as regards easements, and sixty years as regards rights of common, &c., without allowing the legal right in respect of easements to be defeated except in the mode pointed out in s. 8. I think s. 7 throws light upon the subject. That section deals with the rights of persons under disabilities, and provides that: "The time during which any person otherwise capable of resisting any claim to any of the matters before mentioned"—that is, thirty and sixty years with respect to rights of common, &c., and twenty and forty years with respect to easements—"shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible." The general object of the Act being to provide that there shall be no interference with the legal right gained by long enjoyment where that right is declared absolute and indefeasible, no distinction is made even in favour of infants, idiots, feme covertes, or tenants for life, who are all put in the same category. The intention seems to have been that the only exception to the general rule should be that found in s. 8. As to the construction of that section, I cannot bring myself to believe that the experienced lawyers who framed this highly technical Act—an Act similar to the Fines and Recoveries Act for technicality—could have meant

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a remainderman when they used the term "reversioner." One cannot help seeing how easy it would have been to have said "reversion or remainder" if that was meant. I can well understand that there was a good reason for limiting the operation of s. 8 to a reversioner, as opposed to a remainderman, with respect to the right gained by twenty years' enjoyment of lights which is dealt with by s. 3. The effect of s. 8 is well explained by Parke, B., in *Onley* v. *Gardiner*. (1) He says: "The effect of s. 8 is not to unite discontinuous periods of enjoyment, but to extend the period of continuous enjoyment which is necessary to give a right, by so long a time as the land is out on lease, subject to the condition therein mentioned." Where land is on lease for a long term of years the lessor cannot actively interfere with the acquisition of the legal rights under the statute until the tenancy has come to an end. It may extend over the forty years, and the reversioner is then allowed three years within which he may interfere to prevent the right being gained.

The precise point in the present case does not appear to have been raised before. It seems to have been thought that where there was long continued enjoyment—say for sixty years—the right so enjoyed could not be disturbed except where the property was out on lease subject to a reversion. It may be a sound principle of law that in cases of infants, idiots, and femes coverts, where the tenancy has extended over the forty years, and three years have elapsed since the tenancy determined, the enjoyment of the right ought not to be disturbed in view of the extraordinary amount of litigation which would follow if a remainderman were put in the same position as a reversioner. I am of opinion that the defendants are entitled to judgment.

Judgment for the defendants; leave to appeal granted.

Solicitors for plaintiffs: *Poole & Co., for Edmonds & Son, Totnes, Devonshire.*

Solicitors for defendants: *Harris, Powell, & Sieveking, for H. M. Firth, Ashburton.*

(1) 4 M. & W. at p. 500.

A. P. S.

[IN THE COURT OF APPEAL.]

1883
Dec. 21.

IN RE BRADFORD, THURSBY AND FARISH.

Costs—Order on Solicitor personally to pay Costs—Appeal—Judicature Act, 1873, s. 49.

An order that the costs of an application at Chambers on behalf of a client shall be paid by the solicitor personally cannot be costs left to the discretion of the Court within s. 49 of the Judicature Act, 1873, unless the solicitor has been guilty of misconduct or negligence, and, therefore, an appeal lies from such order without leave as to whether there has been such misconduct or negligence.

Decision of the Queen's Bench Division (11 Q. B. D. 373) reversed.

APPEAL by G. S. Hare, a solicitor, from the decision of the Queen's Bench Division, dismissing an appeal against an order of Day, J., at Chambers. The facts, as stated in the report of the proceedings in the Queen's Bench Division (1), are the following:—

The appellant Hare had, as a solicitor on behalf of his client who was in Spain, applied by summons to a master at chambers, for an order that the bill of the respondent's solicitors should be delivered and referred for taxation. There was a question whether Hare had his client's authority to make the application, and after the summons had been adjourned from time to time the master made an order for delivery of the bill only, but dismissed the rest of the application, and, thinking that the conduct of Hare had been vexatious, he added to his order the following direction: "Costs to be taxed and paid by G. S. Hare, solicitor, personally."

Hare then appealed to Day, J., at chambers, from so much of such order as directed the costs to be paid by him personally, but that learned judge dismissed such appeal with costs, to be paid by G. S. Hare personally.

On appeal therefrom to the Divisional Court that Court dismissed the same on the ground that the order appealed from was as to costs only, "which by law are left to the discretion of the

(1) 11 Q. B. D. 373.

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Court" within the meaning of s. 49 of the Judicature Act, 1873 (1), and was therefore not subject to appeal except by leave.

Mirams, for Hare.
Morton Daniel, for Bradford.
Page, for Farish.
Chapman, for Thursby.

Cur. adv. vult.

Dec. 21, 1883. BOWEN, L.J., delivered the judgment of the Court. (2) [After stating at length the facts of the case, his Lordship said as follows:—] The questions which arise are two, first, does any appeal lie at all, and, secondly, if an appeal lies, then, whether the order ordering these costs to be paid by Hare personally was, under the circumstances of the case, justifiable. As to the first question the Divisional Court thought that the matter was concluded by the exercise at chambers of the judge's discretion as to costs, and that according to s. 49 of the Judicature Act, 1873, no appeal would lie from an order which directs a solicitor personally to pay the costs of an abortive application. The following are the words of s. 49:—[His Lordship here read that section.] For the respondents it was argued that the order of Day, J., was within the meaning of that section, an order "as to costs only which by law are left to the discretion of the Court." It appears, however, to us that it was not within the discretion of Day, J., to punish Mr. Hare by his direction as to costs unless Mr. Hare had in fact been guilty of some misconduct or negligence, and that there must have been some misconduct or negligence on the part of Mr. Hare in order to give the judge jurisdiction to exercise his discretion as to costs. Without fixing the precise limits to the exercise of the judge's discretion, we are of opinion that on the question whether there has or not been misconduct or negligence by the solicitor there ought to be an

(1) The following is s. 49 of the Judicature Act, 1873: "No order made by the High Court of Justice or any judge thereof by the consent of the parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal except by leave of the Court or judge making such order."

(2) Brett, M.R. and Bowen, L.J.

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IN RE BRADFORD.

appeal. On that point we do not agree with the Divisional Court, and we may refer to the case of *In re Hardwick* (1) as an authority in support of the view we take of an appeal lying as to such a matter. [His Lordship then dealt with the second question, which depended on the facts, and, whether, under the circumstances, Mr. Hare was justified in believing he had the authority of his client for taking out the summons and for acting as he had done, and after stating the reasons why the Court had come to the conclusion that Mr. Hare had not acted wrongly, his Lordship stated that the order appealed from should be reversed, and that Mr. Hare should be discharged from so much of the order of the master as ordered him personally to pay costs.]

Appeal allowed.

Solicitor for appellant: *G. S. Hare in person.*

Solicitors for respondents: *Bradford & Thursby in person; James, Son, & James.*

W. P.

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April 16.

THE BRISTOL WATERWORKS COMPANY, APPELLANTS; UREN, RESPONDENT.

UREN, APPELLANT; THE BRISTOL WATERWORKS COMPANY, RESPONDENTS.

Bristol Waterworks Acts, 1862 *and* 1865—*Water-rate*—"*Annual Rack-rent or Value*"—"*Gross Sum assessed to the Poor-rate*—*Pleasure Garden attached to and occupied with a Dwelling-house*—*Extra Charge for "a pipe and tap or other apparatus" used in the garden.*

Sect. 68 of the Bristol Waterworks Act, 1862, enacts that the company shall furnish to every occupier of a private dwelling-house within their limits a sufficient supply of water for the domestic use of such occupier, at certain annual rents or rates according to the "annual rack-rent or value of the premises so supplied,"—such supply (by s. 71) not to include, amongst other things, a supply of water "for watering gardens by means of a tap, tube, pipe, or other such like apparatus." And s. 32 of the Bristol Waterworks Amendment Act, 1865, enacts that, "if any dispute shall arise as to the amount of the annual rent or value of any dwelling-house or premises supplied with water by the company, such dispute shall be decided by two justices: provided that the amount of the annual rack-rent or value to be fixed by such justices shall not be

(1) 12 Q. B. D. 148.

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less than the gross sum assessed to the poor-rate, or less than the rent actually paid for such dwelling-house or premises."

A dwelling-house and garden in the occupation of the owner were assessed to the poor-rate as follows,—"Gross estimated rental, 240*l.*" "Rateable value, 204*l.*" It was proved that the value of the house without the garden would be 10 per cent. less; and that the owner contracted to pay and did pay 1*l.* 1*s.* annually for the watering by means of a pipe and tap in the garden which surrounded the dwelling-house and was occupied and assessed therewith:—

Held, upon a case stated by the justices, that the words "gross sum assessed to the poor-rate," meant the "gross estimated rental," and not "rateable or net value;" and that the water-rent was chargeable upon the gross estimated rental of "the premises," including the pleasure garden occupied with the house, and not merely upon the dwelling-house itself,—the extra charge for the garden supply being for using a pipe and tap.

CASES stated by justices pursuant to 20 & 21 Vict. c. 43.

On the 3rd of November, 1884, William Uren and the Bristol Waterworks Company appeared before two justices of Bristol, on the hearing of two summonses in reference to disputes which had arisen between them as to the amount of the annual rack-rent or value of a dwelling-house and premises known as Crofton House, Clifton Down, in the city and county of Bristol, occupied by William Uren, and supplied with water by the company. There were cross-appeals. The cases were substantially as follows:—

The incorporation of the Bristol Waterworks Company was confirmed by the Bristol Waterworks Act, 1862. (1)

By s. 68 of that Act, the company are, at the request of the "owner or occupier, to furnish to every occupier of a private dwelling-house or part of a private dwelling-house in any public street or road within the limits of this Act in which or within one hundred yards of which any main-pipe of the company shall be laid, a sufficient supply of water for the domestic use of every such occupier, at annual rents or prices (hereinafter called 'water-rents') not exceeding the following, that is to say,"—"When the annual rack-rent or value of the premises so supplied with water shall not exceed 5*l.*, five shillings; and when the same exceeds 5*l.*, and shall not exceed 6*l.*, six shillings." . . . "And when the same shall exceed 190*l.*, and not exceed 200*l.*, one hundred shillings: and when the same shall exceed 200*l.*, at a rate not exceeding 2*l.* 10*s.* per 100*l.* per annum; and for every water-closet

(1) 25 & 26 Vict. c. xxx.

or bath there shall be paid the sum of not more than 10*s.* per annum."

Sect. 71 of the same Act is as follows:—"Provided also that a supply of water for domestic purposes shall not include a supply of water for baths, or for cattle, or for horses, or for washing carriages, if the same horses or carriages are kept for hire or by common carriers or are the property of a dealer, or for steam-engines, or for railway purposes, or for warming or ventilating purposes, or for working any machine or apparatus, or for watering gardens by means of any tap, tube, pipe, or other such like apparatus, or for fountains, or for flushing sewers or drains, or for public baths, or for any ornamental purpose whatever."

Sect. 73 of the same Act is as follows:—"It shall be lawful for the company to supply any person with water for other than domestic purposes at such rate and upon such terms and conditions as shall be agreed upon between the company and the persons desirous of having such supply of water: but such last-mentioned supply shall not be furnished by the company so as to prejudice or diminish the full and adequate quantity required for domestic purposes."

Sect. 32 of the Bristol Waterworks Amendment Act (1) is as follows:—"If any dispute shall arise as to the amount of the annual rack-rent or value of any dwelling-house or premises supplied with water by the company, such dispute shall be decided by two justices for the city of Bristol: Provided that the amount of the annual rack-rent or value to be fixed by such justices shall not be less than the gross sum assessed to the poor-rate, or less than the rent actually paid for such dwelling-house or premises."

The respondent, William Uren, is the owner and occupier of a dwelling-house, garden, and stable called Crofton House, at Clifton Down, in a public road in which a main-pipe of the company is laid. The company have, at the request of the occupier of the house and premises, furnished to the occupier thereof a supply of water for the domestic use of such occupier under s. 68 of the Act of 1862, and are entitled to charge for such supply a percentage under such section, one per cent. under s. 69 of the said Act, and

(1) 28 & 29 Vict. c. xxvi.

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one per cent. under s. 26 of the Act of 1865. The company have so supplied as aforesaid to two water-closets in the dwelling-house and to certain taps within the dwelling-house and stables. The dwelling-house is open to and surrounded by the garden; and the occupier has always since the said supply been permitted by the company and has been at liberty to water his said garden with water supplied at the taps within the house.

The property is thus described in the rate-book: —

No. of assessment.	Name of occupier.	Name of owner.	Description of property.		Extent.	Gross estimated rental.	Rateable value.	Amount.
1408	Uren, W.	Uren, W.	House and stables	Crofton House, Clifton		£240	£204	£11 18s.

The garden is a little short of $\frac{3}{4}$ths of an acre in area.

It was sworn by a competent valuer that the annual value of the dwelling-house, if occupied without the garden, would be diminished by 10 per cent.

The company claimed as the water-rent in respect of all the respondent's premises at the following rate per annum:—

	£	s.	d.
2½ per cent. (under s. 68 of the Act of 1862) on 240*l.*	6	0	0
1 per cent. (under s. 69 of the same Act, second proviso)	2	8	0
1 per cent. (under s. 26 of the Act of 1865)	2	8	0
For two water-closets in the house (under s. 68 of the Act of 1862)	1	0	0
For watering the garden by means of a tube and tap	1	1	0
	£12	17	0

The respondent's counsel contended that, in accordance with several reported cases, the company could only charge the percentage of 4½ per cent. on the "rateable value," or the "net sum assessed to the poor-rate," which must be taken as the annual value, as defined by the Parochial Assessment Act, 1836. (1) He also contended, that, as the poor-rate assessment included the garden in the property assessed, the sum charged for watering the garden (for which the respondent was separately charged) should not be reckoned twice, and consequently that the assessment of

(1) 6 & 7 Wm. 4, c. 96.

the "dwelling-house and premises" should be reduced by an amount sufficient to represent the charge for water supplied to the garden: and he claimed that from the assessment upon the whole premises there should be a deduction in respect of the annual value of the garden.

The company, on the other hand, contended that the justices could not reduce the annual rack-rent or value of the premises supplied with water below the sum of 240*l.*, or separate the estimated value of the house and other premises. They further contended that the supply of water to the dwelling-house necessarily included a supply of water to the garden, and that the charge of 21*s.* per annum was not a charge for water supplied to the garden, but for the tap and tube erected in the garden, and therefore the percentage for water supplied to the garden might be charged as well as the 21*s.* for the user of the tap and tube.

The decision of the justices (which was given in writing) was as follows:—

"This is a dispute between Mr. Uren and the Bristol Waterworks Company as to the amount of the annual rack-rent or value of a dwelling-house, Crofton House, stables, and garden at Clifton Down, supplied with water by the company.

"We are directed by the 32nd section of the Act of 1865 to fix such amount at not less than the gross sum assessed to the poor-rate: and we in consequence find the value of such dwelling-house and premises to be 240*l.*, the amount of the "gross estimated value" in the first column of the poor-rate. This gross estimated value it has been proved includes the value of the garden, and that garden is supplied with water and charged for under another section. This arrangement requires us to separate the annual value of the garden from the estimated value of the premises. According to the evidence, 10 per cent. would be a fair deduction in respect of the garden.

We consequently find the value of the dwelling-house and premises in two ways,—first, as a whole, viz. 240*l.*;—secondly, the value of the garden 24*l.*, which would give 216*l.* as the value of the dwelling-house, upon which the percentage allowed by the Act must be calculated."

The questions for the opinion of the Court are,—1. Whether

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in fixing the annual rack-rent or value, the justices were right in taking the figures in the column of the rate-book headed "gross estimated rental," instead of those in the column headed "rateable value;"—2. Whether they were right in assessing the value of the dwelling-house and other premises at 216*l.*, separately from the garden;—3. Whether they were right in directing that the percentage in the Act was to be so calculated; and, if not, what sum should have been decided by them, under s. 32 of the Bristol Waterworks Amendment Act, 1865, as the amount of the annual rack-rent or value of the said dwelling-house and premises supplied with water by the company.

Mar. 21. *Sir Farrer Herschell, S.G.*, *Arthur Charles, Q.C.*, and *A. R. Poole*, for the company. The main question is, what is meant by the expression in s. 68 of the Bristol Waterworks Act, 1862, "annual rack-rent or value of the premises" supplied with water, which by s. 32 of the Bristol Waterworks Amendment Act, 1865, is to be not less than the "gross sum assessed to the poor-rate," or less than the rent actually paid "for the premises." It is submitted that it means the "gross estimated rental," and not the "rateable (or *net*) annual value." This is clearly shewn by the provisions of the Parochial Assessment Act, 1836 (1), and the Union Assessment Act, 1862 (2). The present case is not governed by *Dobbs* v. *Grand Junction Waterworks Co.* (3), where the words of the charging section of the special Act then under consideration were, the "actual amount of the rent" or "the annual value upon which the assessment to the poor-rate is computed." The assessment in this case covered the whole of the premises, viz. the dwelling-house and the garden occupied with it: for this was cited an unreported case of *Lowe* v. *Lambeth Waterworks Co.* The extra charge of 1*l.* 1*s.* per annum was, by special agreement, for the increased consumption by means of the pipe and tap, and formed no part of the "water-rent" properly so called.

Webster, Q.C., and *Goodeve*, for the respondent. The phrase "gross sum assessed to the poor-rate" means "the full sum

(1) 6 & 7 Wm. 4, c. 96.
(2) 25 & 26 Vict. c. 103.
(3) 9 Q. B. D. 151; 10 Q. B. D. 337; 9 App. Cas. 49.

assessed to the poor-rate," that is, "the rateable value" or sum assessed,—the "net annual value," not the "gross estimated rental." The expression "rack-rent" is used merely to distinguish it from a rent reserved under a lease granted with a premium. The "sum assessed to the poor-rate" is the amount upon which the rate is payable. Whether the word used be "net" or "gross," that which is meant is "annual value:" see the judgment of Lord Bramwell in *Dobbs* v. *Grand Junction Waterworks Co.*, in the House of Lords. (1) [The following authorities were also referred to:—Blackstone's Commentaries, Vol. II., Book II., ch. 3, p. 43; *Warrington Waterworks Co.* v. *Longshaw* (2); *Busby* v. *Chesterfield Waterworks Co.* (3)]

Cur. adv. vult.

The judgment of the Court (Smith, J., and Mathew, J.) was delivered by

SMITH, J. The questions raised by these cross appeals are,—1. What is the meaning of the terms "the gross sum assessed to the poor-rate," in s. 32 of the Bristol Waterworks Amendment Act, 1865?—2. Whatever it may mean, is it to be the sum assessed upon the private dwelling-house together with the garden thereto attached, or only the sum assessed upon the dwelling-house itself?

The two material sections upon which these questions arise are s. 68 of the Bristol Waterworks Act, 1862, and s. 32 of the Bristol Waterworks Amendment Act, 1865.

By s. 68 of the Act of 1862, the company are, "at the request of the owner or occupier, to furnish to every occupier of a private dwelling-house, or part of a private dwelling-house, in any public street or road within the limits of this Act in which or within one hundred yards of which any main pipe of the company shall be laid, a sufficient supply of water for the domestic use of every such occupier, at annual rents or prices (hereinafter called 'water-rents') not exceeding the following, that is to say,—when the annual rack-rent or value of the premises so supplied with water

(1) 9 App. Cas. 55.
(2) 9 Q. B. D. 145.
(3) E. B. & E. 176; 27 L. J. (M.C.) 174.

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shall not exceed 5*l.*, five shillings; and, when the same shall exceed 5*l.*, and shall not exceed 6*l.*, six shillings."

Sect. 32 of the Bristol Waterworks Amendment Act is as follows:—"If any dispute shall arise as to the amount of the annual rack-rent or value of any dwelling-house or premises supplied with water by the company, such dispute shall be decided by two justices for the city of Bristol: Provided that the amount of the annual rack-rent or value to be fixed by such justices shall not be less than the gross sum assessed to the poor-rate, or less than the rent actually paid for such dwelling-house or premises."

Now, what is the meaning of the phrase "shall not be less than the gross sum assessed to the poor-rate," in s. 32?

The Solicitor-General, on behalf of the water company, insisted that it means the gross estimated rental, and not the rateable value, or, in other words, the gross and not the net annual value of the premises. He argued that the word "gross" is a well-known term, and does not mean "net," and he pointed out that the Amendment Act of 1865 was passed shortly after the passing of the Union Assessment Act of 1862 (1), by s. 15 of which the meaning of "gross estimated value" was defined. He also referred to the scheme of the Parochial Assessment Act, 1836 (2), as shewing that, in an assessment to the relief of the poor, there is the column calculated upon the "gross estimated rental," and the column calculated upon the "rateable value;" and he contended that in the Bristol Waterworks Amendment Act, 1865, the term "gross sum assessed to the poor-rate" means what it says, and not the "net or rateable value of the premises assessed," as contended for by the other side.

Mr. Webster, for the consumer, argued that this is not so, and that the phrase "gross sum assessed to the poor" means the full sum assessed to the poor, i.e. the net and not the gross annual value. His argument was as follows:—He said, "rack-rent" is only a rent of the full value of the tenement or near it, and cited Blackstone's Commentaries, Book II., ch. 3, p. 43; that the phrase "annual rack-rent or value" in statutes then under consideration had been held to mean "rateable value," or, in other words,

(1) 25 & 26 Vict. c. 103. (2) 6 & 7 Wm. 4, c. 96.

"annual value," and he cited in support of this the cases of *The Sheffield Waterworks Co.* v. *Bennett* (1) and *The Warrington Waterworks Co.* v. *Longshaw.* (2) He said that the phrase "less than the rent actually paid" had been held to mean "annual value" in *Dobbs* v. *Grand Junction Waterworks Co.* by the Queen's Bench Division (3); and that "annual value" had been held by the House of Lords in that case (4), in the statute then under discussion, to mean "net annual value;" and consequently, he said that the term "rent actually paid" in s. 32 of the Bristol Waterworks Amendment Act, 1865, must mean "net annual value." It is impossible, he says, to suppose that the legislature intended to create two different standards of minima in s. 32 of the Act of 1865, and that therefore the term "gross sum assessed to the poor-rate," in s. 32 of that Act must be held to mean "net annual value," and not "gross estimated rental."

We pressed him at the time to state what he proposed to do with the word "gross" in the section: and he was forced to read the section as if it contained after the word "gross" the word "net," or, in other words, to read it thus,—"gross net sum." He admitted that such a phrase was certainly novel; but still he insisted that this was the proper reading of the section. The result of his argument is that we are to read "gross sum assessed to the poor-rate" to mean "net sum assessed to the poor-rate," or, in other words, "net annual or rateable value."

We are unable to do so. It seems to us that the fallacy of his argument is exactly that which was pointed out by the late Master of the Rolls in *Southwell* v. *Bowditch.* (5) Sir George Jessel thus demonstrates it,—Contract A. has been held by the Court to mean so and so. Contract B. then comes up for adjudication: it is somewhat similar to contract A.; therefore, says the Court, it must be held to mean the same thing as contract A. Contract C. then comes on for discussion: it is somewhat like contract B., the Courts have interpreted contract B.; therefore contract C. must be held to mean the same as contract B., and so on, till at last contract X. is held to mean the same as contract A., though wholly dissimilar.

(1) Law Rep. 7 Ex. 409.
(2) 9 Q. B. D. 145.
(3) 9 Q. B. D. 151.
(4) 9 App. Cas. 49.
(5) 1 C. P. D. 374.

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We think that what Lord Watson pointed out in his judgment in *Dobbs's Case* (1) is very applicable to the present, viz. that it is not because in that case the term "annual value," or indeed the term "actual amount of rent paid," was held to mean "net annual value," that in every statute these words must be read as meaning "net value." It seems to us that, if the word "gross" had been in the statutes discussed in *Dobbs's Case* (1) (and indeed in the other cases) before the words "annual value," the decisions would not have been what they have. The water companies in those cases would not then have had to attempt to insert that word, and which, as Lord Bramwell in his judgment (2) pointed out, was what they were in reality seeking to do.

We cannot in the section now in question read "gross sum assessed to the poor-rate" as meaning "full net sum," or "gross net sum," or indeed as "net annual value," as insisted upon by the consumer; and, in our judgment, it seems to us that, whatever may hereafter be held to be the true meaning of the phrase "rent actually paid," in s. 32 of the Bristol Waterworks Amendment Act, 1865, the legislature has clearly expressed its intention and meaning by the phrase "the gross sum assessed to the poor-rate." The Act of 1865 was passed with full knowledge of the Parochial Assessment Act of 1836, which dealt and distinguished between "gross estimated rental" and "rateable value," and also of the Union Assessment Act, 1862, which in s. 15 specifically defined what gross estimated rental was: and in our judgment the phrase "gross sum assessed to the poor" means the "gross estimated rental," and not the "net annual value," as contended for by the consumer.

It should be noticed that, as to the meaning to be placed upon the phrase "the rent actually paid" in s. 32 of the Act of 1865, that that Act was passed before any of the cases cited by Mr. Webster or the other Acts were determined.

In our judgment, the case of *Brown* v. *Richmond Waterworks Co.* (3) was well decided, and that the learned counsel gave up nothing by refusing to argue the point now alone discussed and adjudicated upon.

As to the second point, viz., whether the gross sum assessed to

(1) 9 App. Cas. at p. 60. (2) 9 App. Cas. at p. 55.

(3) Not reported.

the poor-rate is to be the sum assessed, as it is assessed, upon the dwelling-house and garden, or only upon the dwelling-house itself.

It is necessary as to this point to consider s. 71 of the Bristol Waterworks Act, 1862, in addition to the two sections above mentioned. That section is as follows: "Provided also that a supply of water for domestic purposes shall not include a supply of water for baths, or for cattle, or for horses, or for washing carriages, if the same horses or carriages are kept for hire or by common carriers or are the property of a dealer, or for steam engines, or for railway purposes, or for warming or ventilating purposes, or for working any machine or apparatus, or for any trade, manufacture, or business whatsoever, or for watering gardens by means of any tap, tube, pipe, or other such like apparatus, or for fountains, or for flushing sewers or drains, or for public baths, or for any ornamental purpose whatever."

By s. 68 of the Act of 1862 the company is to furnish, at the rates therein specified, every occupier of a private dwelling-house or part of a private dwelling-house with a sufficient supply of water for domestic use.

The question here is what is meant by supplying a private dwelling-house or part of it with water for domestic use. Does it mean simply the dwelling-house per se, or the dwelling-house with its appurtenances, or the dwelling-house with its appurtenances as they may happen to stand assessed to the poor-rate in the rate-book?

We do not think that it necessarily means the dwelling-house with its appurtenances as assessed to the poor-rate in the rate-book: for, it might well be that the property occupied as a whole and so assessed might consist of a dwelling-house together with such appurtenances, the supplying of which latter with water would clearly not be for domestic use. Suppose a dwelling-house together with such an amount of land to be assessed to the poor-rate upon the rate-book, that the occupier keeps thereon a herd of cows or other animals—could it be said that the watering of such animals was a domestic use or purpose? It seems to us not, though, as was pointed out by the late Master of the Rolls in the unreported case of *Lowe* v. *Lambeth Waterworks Co.*, if

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only one cow or so were kept and the milk was used in the house, the watering of such cow might well be held a domestic use. It seems to us to be in each case a question of fact to be determined as each case arises. In our judgment, the assessment in the rate-book is not necessarily to be taken as the standard.

Does it then mean dwelling-house with its appurtenances, or only the dwelling-house or part of it per se? It is admitted on all hands that these waterworks statutes supply but a rough-and-ready way of estimating upon what and at what rate the water-rent is to be levied and paid. Sect. 71 of the Bristol Waterworks Act, 1862, seems to us to contemplate that the supply of water to a private dwelling-house for some garden purposes might well be considered as for domestic use; for, it therein enacts what shall not be considered as domestic purposes, though, as was pointed out by Sir George Jessel in *Lowe* v. *Lambeth Waterworks Co.*, every purpose not enumerated in that section cannot be considered a domestic purpose. The case of *Busby* v. *Chesterfield Waterworks Co.* (1) shews that upon the statute then in question water used for washing a private carriage and watering a private carriage horse may well be considered as a domestic use. The Court in that case would not adopt the argument that "domestic use" meant solely the use by the family for the consumption and cleanliness of those resident within the house. In *Lowe* v. *Lambeth Waterworks Co.*, Sir George Jessel held that the word "house" in that Act meant the tenement supplied with water, and not merely the house itself.

In our judgment, water used for the mere amenities of the house, such as, in this case, the watering of the pleasure-garden surrounding and attached to and occupied with the house, may legitimately and fairly be held to be used for domestic purposes within the meaning of the statute in question. It should be noticed that, as the value of the whole of the premises, that is, house and garden, is assessed, it seems to us that the water company does not suffer detriment by so holding.

It is however urged that in this case the consumer has contracted to pay, and does pay, 21*s.* per annum for watering his garden by means of a special tap, as is provided for by s. 71 of

(1) E. B. & E. 176; 27 L. J. (M.C.) 174.

the Bristol Waterworks Act, 1862. This is so; but it does not seem to us that this fact should alter the area upon which, and consequently the amount upon which, the water-rent should be assessed. If a consumer desires to use such an amount of additional water as a special tap, tube, or pipe will supply, there is nothing, as it seems to us, unreasonable in holding that he should pay for such accommodation in excess of what he would otherwise pay: and we are of opinion that the true reading of the statutes before us is, that the consumer in this case is to pay upon the value (as before defined) of the dwelling-house with its appurtenances, for water used not merely in the dwelling-house itself but also in watering the pleasure-garden surrounding and attached to and occupied with the house, and used and enjoyed as the garden in this case is as a mere amenity to the house.

If this view is correct, as we think it is, inasmuch as the house plus garden is assessed to the water-rate, the consumer pays and the company receives the 21*s.* per annum for the additional water likely to be used by reason of the additional accommodation afforded; and the consumer also pays and the company receives for the water ordinarily used and supplied to the whole tenement for domestic use.

We are of opinion that the appeal of the consumer should be dismissed, and that the appeal of the company should be allowed; and in each case with costs.

Judgment accordingly.

Solicitors for the company: *Clark, Woodcock, & Ryland, for Fussell & Co., Bristol.*

Solicitors for the consumer: *Torr & Co., for E. E. Salmon, Bristol.*

J. S.

1885
May 21.

TOZIER AND WIFE *v.* HAWKINS.

Writ of Summons—Service out of the Jurisdiction—Injunction—Order XI., r. 1 (f)—Objection out of Time—Order LXX., r. 2.

A writ of summons claiming an injunction to restrain the defendant (resident in Dublin) from sending to the plaintiffs, or either of them, in London, through the post-office or otherwise, libellous, defamatory, or obscene post-cards, &c., and also claiming damages, may by leave of the Court be issued and served upon a defendant residing in Dublin, under Order XI., r. 1 (*f*), notwithstanding the obstacles to making the injunction available.

Objection after appearance, too late: Order LXX., r. 2.

A WRIT issued with the leave of the Court for service in Dublin, where the defendant was resident, was indorsed as follows:—

"The plaintiffs' claim is for an injunction to restrain the defendant from writing or publishing any libels of or concerning the plaintiffs or either of them, and to restrain the defendant from sending to the plaintiffs or either of them, through the post-office or otherwise, any libellous, defamatory, or obscene post-cards, libellous pictures, or caricatures, similar to those sent to the female plaintiff on March 15th, 18th, 24th, and 26th, 1885, *and for damages.*"

After appearance entered,

Winch moved to set aside the writ for want of jurisdiction. The leave to issue this writ was obtained upon the authority of Order XI., rule 1 (*f*), which provides that "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge whenever" "any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof." To warrant the writ, the thing to be prohibited or restrained must be a thing to be done within the jurisdiction of the Court: *Bree* v. *Marescaux.* (1)

[LORD COLERIDGE, C.J. Publication of the libel here suffices to give jurisdiction: *Rex* v. *Burdett.* (2)]

It may be conceded that delivery of the post-cards in England would be a publication here; and it may also be conceded that

(1) 7 Q. B. D. 434. (2) 4 B. & A. 95.

the post-cards in question are of a libellous character: but the injunction, if issued, could not be enforced, the remedy being only by attachment, and the defendant having no residence in England. The object of this writ is to found a claim for damages. Apart from the injunction, there is no cause of action here; and therefore 31 & 32 Vict. c. 54, which applies only to judgments in actions, for debts or damages, will not help the plaintiffs. It may be said that the defendant is estopped by Order LXX. r. 2 (1), he having taken a step in the action after notice. But this is not an irregularity: the writ, being without jurisdiction, is a nullity: and no consent can give jurisdiction.

[LORD COLERIDGE, C.J. To what case could the rule apply if not to this?]

To the case of a threat to do something actionable within the jurisdiction.

M'Call, for the plaintiffs, was not called upon.

LORD COLERIDGE, C.J. Mr. Winch has argued this case with great ingenuity and with perfect fairness. His contention is that Order XI., r. 1 (*f*), does not authorize the Court to issue an injunction to a person resident out of this country to restrain the doing of something within it. If that were the true construction of the rule, it would be wholly inoperative. It provides that service out of the jurisdiction of a writ of summons may be allowed by the Court or a judge whenever "any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed." I am of opinion that that rule gives us abundant jurisdiction in this case. Part of the order, at all events, could be enforced. No answer was given to the second point.

CAVE, J., concurred.

Motion dismissed.

Solicitor for plaintiffs: *John Haywood.*

Solicitors for defendant: *Pickett & Mytton.*

(1) "No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity."

J. S.

1885
June 30.

THE VESTRY OF ST. JOHN, HAMPSTEAD, APPELLANTS; HOOPEL, RESPONDENT.

Metropolis Management Acts—New Street—Pavement—Power to make Branch Drains to Sewer—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 78, 250—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 112.

A builder made drains from certain houses in a road to the boundary of the forecourts of the houses. The road was what is known as a builder's road, made and coated with gravel and ballasted. The footpaths were made with gravel and kerbed with granite. The houses on either side of the road were not completed and inhabited, but the road was open for carriages and foot-passengers. It was lighted by the parish but had not been taken to as a public road. The vestry made branches from the drains into a sewer which belonged to them and ran along the centre of the road, and for that purpose they opened the road and footway. The builder declined to repay to the vestry the expenses incurred thereby:—

Held, (1.) that the road was not the less a street within the definitions in s. 250 of the Metropolis Management Act, 1855, and s. 112 of the Metropolis Management Act, 1862, because it came within the definition of a new street in the last-mentioned section;

(2.) That s. 78 of the Metropolis Management Act, 1855, which authorizes the opening of the pavement of any street for the purpose of branching private drains into a sewer, applies equally to streets and to new streets;

(3.) That, looking to the definition of the word "pave" in s. 112 of the Metropolis Management Act, 1862, the road was paved:—

That, consequently, the vestry had opened a part of the pavement of a street and were entitled under s. 78 of the Metropolis Management Act, 1855, to recover the expenses incurred by them.

CASE stated by a metropolitan police magistrate.

The appellants through their surveyor preferred an information against the respondent for neglecting and refusing to pay the appellants the sum of 11*l.* 7*s.* 7*d.*, being the expenses incurred by them in making and branching certain drains from four houses in Eresby Road, in the parish of St. John, Hampstead, belonging to the respondent, into the sewer under the Eresby Road, it being necessary to open part of the pavement of the street for the purpose of making and branching such drains into the public sewer.

Eresby Road runs out of the High Road, Kilburn, in the parish of St. John, Hampstead, into Kingsgate Road in the same parish. It has not yet been taken to by the parish, and the

appellants are not now liable to the repairs thereof, but the respondent has applied to the appellants to light the same as a public road, and it has been lighted by them accordingly. It was formed and made by the owner of the freehold of the land in the year 1882, such formation having been previously sanctioned by the Metropolitan Board of Works on condition that no barrier was thereafter erected in such road, and the owner in the same year constructed the sewer in that road. Such sewer belongs to and is vested in the appellants. The road is opened from end to end, and horses, carts, carriages, and persons on foot can and do pass and repass along and through it into other streets and roads in the parish of St. John, Hampstead.

The respondent is a builder, and has erected a number of houses on both sides of Eresby Road. The road is what is ordinarily known as a builder's road, the bottom being well made and coated with gravel and ballasted, and it is in fairly good condition. The footpaths on the sides of the road are made up with hoggin or gravel, and they are kerbed with granite, but are not flagged. Very many of the footpaths by the sides of old roads or streets in the parish of Hampstead are made up in a similar way, and permanently used without being flagged. The respondent made the private drains of the four houses belonging to him, in respect of which the summons was issued, from such houses up to the external wall of the forecourts thereof, and applied to the appellants for their consent to his constructing the drains to the public sewer, but they refused such consent, and gave notice that pursuant to the provisions of s. 78 of the Metropolis Management Act, 1855 (1), they would make and branch the private drains

(1) Sect. 78 of the Metropolis Management Act, 1855, enacts: "Whenever it is necessary to open any part of the pavement of any street or public place for the purpose of making or branching any private drain into any of the sewers or drains vested in the Metropolitan Board of Works, or any vestry or district board under this Act, or authorized to be made by them under this Act, it shall be lawful for the vestry or board in case they think fit so to do, to make so much and such part of such private drain, and also to construct so much and such part of the work necessary for branching the same into the public sewers as shall be under or in any street, and to recover the expenses incurred thereby from the owner of the house, building, or ground to which such private drain belongs in the manner hereinafter provided."

Sect. 250 of the same Act enacts:

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from the houses into the public sewer in accordance with the terms of that section, charging the respondent only the expenses actually incurred thereby. The expenses so incurred by the appellants amounted to the sum of 11*l.* 7*s.* 7*d.*, which the respondent refused to pay. In order to make and branch the drains it was necessary to open the road and pathway.

The magistrate dismissed the summons upon the ground that s. 78 of the Metropolis Management Act, 1855, did not apply to the builder's road and pathway, which were not shewn to be finally gravelled, and which could not be treated as being paved, or the surface thereof be treated or defined as forming a pavement. It was contended, on the part of the respondent, that Eresby Road was not a "street" or "public place" within the terms and meaning of s. 78 of the Metropolis Management Act, 1855, and s. 250 of the same Act, inasmuch as it was simply made up of materials which might be destroyed, and which, excepting the kerb, were not intended to form part of the ultimate permanent road. The magistrate gave no decision on this question.

The questions for the opinion of the Court were:—

Whether Eresby Road and the pathways so made up and constructed as aforesaid is a street or public place within the meaning of s. 250 of the Metropolis Management Act, 1855, and s. 112 of the Metropolis Management Act, 1862, and whether the same is so paved as to be within the 78th section of the first-named Act.

"The word 'street' shall apply to and include any highway (except the carriageway of any turnpike road) and any road, bridge (not being a county bridge), lane, footway, square, court, alley, passage whether a thoroughfare or not, and a part of any such highway, road, bridge, lane, footway, square, court, alley, or passage."

Sect. 112 of the Metropolis Management Act, 1862, enacts "the word street shall be deemed to apply to and include the subject matters specified in the 250th section of the firstly recited Act, and also any mews and a part thereof; the expression 'new street' shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets the maintenance of the paving and roadway whereof had not previously to the passing of this Act been taken into charge and assumed by the commissioners, trustees, surveyors, or other authorities having control of the pavements or highways in the parish or place in which such streets are situate, and a part of any such street, and also all streets partly formed or laid out," and "the word 'pave' shall apply to and include the formation of the roadway or footway of any street."

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F. M. White, Q.C. (*Whiteway* with him) for the appellants. Admitting that this road is within the definition a "new street," it is also within the wider term "street." It cannot have been intended to restrict the powers of vestries in the case of "new streets" to the few cases in which that expression is used in the Acts. There is nothing expressly enacted as to new streets which is inconsistent with the general power of the vestry to branch drains in s. 78 of the first Act, consequently there is nothing to prevent the application of that section to the present case. Pavement does not necessarily mean flagging or putting down other large stones but applies to the description given in the case of this road.

Bartley Denniss, for the respondent. The question whether a road is paved is a question of fact for the magistrate. The word "pavement" should be given its ordinary meaning of a stone flooring to the street. This is shewn by s. 105 of the first Act, which contemplates new streets being made, though not paved. That whole section would be useless if such a road as this can be said to be paved. Further, if this road is paved the power of the vestry under s. 78 to make branch drains must apply universally, and is inconsistent with the duty thrown by s. 75 on the person who builds or rebuilds a house to make such drains, and with the provisions of s. 79, which enables the vestry to contract with the owners or occupiers in respect of drains "required to be made, altered, or enlarged by such owners."

F. M. White, Q.C., in reply. There is no such inconsistency as is suggested, for one obligation on the owner is to make drains on his own land, and s. 79 relates to contracts by the vestry to make such drains for him. Another obligation is to make the branches beyond his own land, but in such case the vestry may, if they think fit, and in case it is necessary to open a pavement, do the work themselves under s. 78.

Cur. adv. vult.

June 30. LORD COLERIDGE, C.J. In this case the question for our consideration is whether the vestry have power to construct the work necessary for branching a private drain with the public sewer. The magistrate, in effect, decided that they had not.

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The street is apparently not yet a complete street, in the ordinary sense of the word, that is to say, although it is a place over which the public have rights of passage at present, as I understand, the houses on either side are not yet completed and inhabited: and if there has been an intention to dedicate to the public, there has not been a taking over of the street by the parish authorities.

It appears to me that two points, and two points only, are now necessary to be considered. First of all, is this a street or public place (because both words are used) within the meaning of s. 78 of the Metropolis Management Act, 1855, and, secondly, is that which has been necessarily opened a pavement? If it is a street, and if what has been opened is a pavement, then it seems to me that the vestry have the right to succeed.

Now, first of all, is this surface which has been dealt with a street or public place? In the earlier Act, 18 & 19 Vict. c. 120, by the 250th section, which is the interpretation clause, it is enacted that "the word 'street' shall apply to and include any highway (except the carriageway of any turnpike road), and any road, bridge (not being a county bridge), lane, footway, square, court, alley, passage (whether a thoroughfare or not), and a part of any such highway, road, bridge, lane, footway, square, court, alley, or passage." Now, from the statement in the case and from the photographs which have been appended to the case, and which we are told by the magistrate are to be taken as part of it, it appears to me clear that the place in question is a street within this definition.

But it was said that that does not determine the question because of the interpretation clause in the 112th section of the subsequent Act; and that by that interpretation clause the interpretation of the word "street" is to be narrowed; upon the ground (which, no doubt, is a ground which exists in fact whatever be the inference to be drawn from it), that in that section there are two expressions "street" and "new street," and that "new street" is defined differently from "street." It is argued that this is a new street within the meaning of the 112th section of the later Act (which I quite agree it is), and that, therefore, it is not a street within the definition of the earlier Act. It appears

to me that within the word "street," as well as within the words "new street," this place with which we have to deal may well be included. By s. 112 of the second Act, this word "street" is to apply to and include everything mentioned in the 250th section of the earlier Act, and if this road is within those words which I have just read, it would seem that it is a street none the less because for other purposes it may be a new street.

But even supposing it to be a new street, nothing has been shewn in either of the Acts to take a new street out of the operation of the 78th section of the earlier Act with regard to streets.

Two objects appear to have been aimed at by the 78th section —the protection of the public and the protection of the vestry and the authorities. Wherever there is a space of ground over which the public have rights, and under which it may be necessary to construct sewers or drains which are to go into a main sewer, it is extremely desirable that those who have the maintenance and government of the sewers should have the construction of them, to see that they are properly joined with the main sewer and constructed in a proper and satisfactory manner; and it is far easier for them to do it themselves than for them to be dependent upon the work of other people; and secondly, that, they being responsible for the surface of the streets, and for any damage that might happen in dealing with the surface of the streets, the replacing of the pavement and the re-doing of the streets after it has been necessary to open it by them, should also be a matter over which they should have control. Both those objects are effected, if the view which I am endeavouring to express is taken of the statute; and they are not effected if the view is taken which the learned magistrate placed upon it. It seems to me, therefore, that there is abundant ground for coming to the conclusion that the magistrate has narrowed too much the construction of this section, and that the vestry have a right to do what they did.

But there is a second point to be dealt with. The expression is "whenever it is necessary to open any part of the pavement *or* any street or public place," and so forth. "Or," it is admitted, is a mistake for "of," because, in the Queen's printer's copy, it is so printed, and the real fact is so expressed.

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Then it was said that this is not a pavement. Now, here again the facts are not fairly in dispute at all. The photographs are before us, and we can judge for ourselves from the photographs what was the state of this street when the matter was decided by the magistrate; because he refers us to them. The argument addressed to us was, that the road must necessarily have something in the nature of an actual solid pavement to come within the meaning of the section, and that this, which is a builder's footway and a builder's roadway, is not a pavement. It is admitted it is well laid, up to a certain point—that the foundation is well laid—that the road, for common and ordinary purposes, is sufficient, and that it is gravelled, though not metalled, and that it presents the appearance of a sufficiently substantial roadway for a great many purposes. It probably would not be sufficient to carry the traffic of London Bridge, but it may be abundantly sufficient to carry the traffic which is ever likely to go down this street. So as to the footway. The footway is of gravel and what they call hoggin, and substantially fit for present purposes. It is bound in by a granite kerb, and there is a sufficiently physical distinction between the roadway and the footway to make it perfectly plain that the one is for foot passengers and the other is for carriages.

Is that a pavement? In one sense of the word of course it may be said that "pavement" means flagging; but then we have a definition—not of the word "pavement," it is true, but of the word "pave." We have a definition of the word "pave" in the 112th section of the later Act, which says that the word "'pave" shall apply to and include the formation of the roadway or footway of any street."

I will not go over the argument again about "street"; but it is admitted that there is a roadway and a footway. It is admitted that the roadway and the footway are formed—that there has been a formation of them. The Act of Parliament says that that which is so formed is paved. It does not mention pavement, but, as I ventured to put two or three times over in the course of the argument, what is that thing which is the result of paving but a pavement? I think, therefore, on the true construction of the two Acts, read together, that although "pavement" is not defined,

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there is no difficulty in holding this road to be paved. All the reasons why the vestry should have the power of doing what they have done in this case apply just as much in the case of streets in which there is an inchoate pavement as they do in the case of streets where there is a permanent and lasting pavement. The dealing with a sewer is the same; the construction of drains is the same; and the opening of the surface, as far as the public are concerned, is the same.

I think, therefore, upon the two points on which the magistrate asks the opinion of the Court—that, in the first place, this is a street; and, in the second place, it has been necessary to open a part of the pavement of it, and that our judgment must be for the appellants.

MATHEW, J. I am of the same opinion.

Judgment for the appellants.

Solicitor for appellants: *W. Gribble.*
Solicitor for respondent: *S. Tilley.*

A. M.

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July 7.

RICHARDS *v.* THE WEST MIDDLESEX WATERWORKS COMPANY.

Water-rate—Recovery of Arrears by Distress—West Middlesex Waterworks Acts, 46 *Geo.* 3, *c. cxix.*; 50 *Geo.* 3, *c. cxxxii.*; 15 *&* 16 *Vict. c. clix.—Waterworks Clauses Consolidation Act*, 1847, 10 *&* 11 *Vict. c.* 17—*Effect of, upon the Company's special Acts.*

By an Act of 46 Geo. 3, c. cxix. s. 59, the West Middlesex Waterworks Company were to supply water to the occupiers of premises in certain parishes, they paying to the company such rates or sums of money for such water as should be *mutually agreed upon between them*, and, in default of payment, power was given to the company to issue their warrants for the recovery of arrears by distress and sale of the consumer's goods. By a subsequent Act of 50 Geo. 3, c. cxxxii. s. 13, it was provided that the company should not alienate their powers, but only take and demand "such sums *as should be reasonable*" for the water supplied under the provisions of that Act. And by 15 & 16 Vict. c. clix. (passed in 1852), which recited the earlier Acts of the company, it was provided that, "except by this Act expressly provided, this Act or anything therein contained shall not repeal, alter, interpret, or in any manner affect any of the provisions in force at the commencement of this Act, of the recited Acts or any of them; and, except only so far as is requisite for the execution of this Act, all those provisions, and all powers thereby respectively created, conferred, or saved, shall be and continue as valid and effectual as if this Act had not passed":—

Held, that the effect of s. 13 of 50 Geo. 3, c. cxxxii. was merely to alter the mode of ascertaining the amount of the rate, but not the mode of enforcing payment of arrears; and that the power of distress given to the company by s. 59 of the Act of 46 Geo. 3, was not (either expressly or by implication) taken away by the Act of 50 Geo. 3, or by any of the provisions of the Waterworks Clauses Consolidation Act, 1847; but that such power of distress was expressly preserved to the company by s. 48 of 15 & 16 Vict. c. clix.

Held also, that the company were not responsible for an assault committed by the broker or his assistant when executing the warrant.

ACTION for trespass and wrongful distress, and for alleged assault by the broker in execution of the warrant, tried before Huddleston, B.

The plaintiff had been for several years supplied with water by the defendants, the West Middlesex Waterworks Company, under their Acts of incorporation; and, the water-rent or rate being in arrear, the company issued their warrant of distress for the recovery thereof, in the execution of which warrant their broker, one Peachey, as was alleged, assaulted the plaintiff and thrust him through a window. At the trial two questions were raised,—1. whether the company had power to issue *their own warrants*

for the recovery of arrears,—2. whether they were responsible for the alleged misconduct of their broker.

The first of these questions depended upon the construction of s. 59 of a private Act of 46 Geo. 3, c. cxix. coupled with two subsequent private Acts, of 50 Geo. 3, c. cxxxii., and 15 & 16 Vict. c. clix., and the provisions of the Waterworks Clauses Act, 10 & 11 Vict. c. 17.

The 59th section of 46 Geo. 3, c. cxix., enacted that "such of the inhabitants of the several parishes" mentioned in the Act, "and all other such persons as shall be desirous of having water from the said waterworks into their houses, &c., may and are hereby authorized and impowered, at their own expense (having first obtained the consent in writing under the hand of such person as shall be authorized by the said company of proprietors, or their directors, to give such consent), and with the consent of the owners of the premises through which the pipes shall be conveyed, to open the ground between the company's aqueducts or main pipes and the respective houses of such inhabitants, and to lay any leaden pipe or pipes (the bore thereof to be ascertained by the said company) from such respective houses, &c.; such respective inhabitants paying to the said company of proprietors yearly, &c., such rate or rates or sum or sums of money for such water as shall be mutually agreed upon between them;" and, in case of default in payment of such rate by any person, power was by the same clause given to the company to stop the supply of water to his house, &c., and sever it from the main pipe by which it was communicated, and to recover the rate by distress and sale of the defaulter's goods.

By 50 Geo. 3, c. cxxxii., the company was authorized to enlarge its works; and s. 13 enacted that "it should not be lawful for the company at any time thereafter to sell or dispose of any of the rights, privileges, or powers or authorities, vested in them by that Act of supplying the said parishes or places with water, or any of them, to any person or persons whomsoever, but only to take and demand such sums as should be reasonable for the water supplied under the provisions of this Act." These two Acts, amongst others, were recited in a subsequent Act of 15 & 16 Vict. c. clix., by s. 48 of which it was enacted that, "except as by this

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Act expressly provided, this Act or anything therein contained shall not repeal, alter, interpret, or in any manner affect any of the provisions in force at the commencement of this Act or the recited Acts or any of them; and, except only so far as is requisite for the execution of this Act, all those provisions, and all powers, privileges, exemptions and immunities of or for the benefit of any person or corporation thereby respectively created, conferred or saved, shall be and continue as valid and effectual as if this Act had not passed."

It appeared that, on the 18th of August, 1883, the defendant Newton, a broker, accompanied by another man, Peachey, armed with a warrant issued by the company under s. 59 of the Act of 46 Geo. 3, c. cxix., entered the premises of the plaintiff for the purpose of distraining for 1*l.* 7*s.*, arrears of water-rate; and that, as the plaintiff was proceeding through his shop to procure the money, the broker's man without (as was alleged) any provocation struck him a severe blow, and knocked him through a glass-door which separated the shop from the private part of the plaintiff's premises.

It was contended on the part of the company that they were duly authorized by the Acts referred to to issue their own warrant for the recovery of the arrears of water-rate; and that, if any assault was committed by the broker or his man, it was not an act done within the scope of his authority for which the company could be held responsible.

For the plaintiff it was contended that the authority conferred upon the company by 46 Geo. 3, c. cxix., had been taken away expressly or by implication by subsequent private Acts, or by the provisions of the Waterworks Clauses Act, 10 & 11 Vict. c. 17.

The learned Baron, however, ruled that the power conferred upon the company by s. 59 of the Act of 46 Geo. 3, of issuing their own warrants, was not taken away by the subsequent legislation, and that the company were not responsible for any excess committed by their broker in the execution of the process intrusted to him: and he accordingly nonsuited the plaintiff.

Castle, for the plaintiff, moved for a new trial. The power of distress given to the company by s. 59 of 46 Geo. 3, c. cxix., is

expressly taken away by s. 13 of 50 Geo. 3, c. cxxxii., where the supply ceases to be a supply by *mutual agreement*. If not, it is at all events impliedly taken away by the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), with the provisions of which the existence of such power is wholly inconsistent: see *Parry* v. *Croydon Gas Co.* (1); *Great Consumers' Gas Co.* v. *Clarke.* (2)

For the acts committed by Peachey, the bailiff's assistant, while in the execution of the warrant intrusted to him, the company are clearly liable.

Poland (*Earle* with him), for the company, and

L. Glyn, for Newton the bailiff, were not called upon.

LORD COLERIDGE, C.J. This was a motion for a new trial, on the ground that the learned judge improperly nonsuited the plaintiff. It appears that the plaintiff was indebted to the West Middlesex Waterworks Company for water supplied to him for three quarters ending at Midsummer, 1883; that the company, in pursuance of the power vested in them by their Act of incorporation (3), issued their warrant for the recovery of the amount, which warrant they delivered to their co-defendant Newton to execute; that Newton took with him an assistant named Peachey; and that Peachey, without instructions from or the knowledge of either of the defendants, committed a serious assault upon the plaintiff. Two points were made at the trial,—1. That the authority conferred upon the company by s. 59 of 46 Geo. 3, c. cxix., if it ever existed, was repealed, if not expressly at least impliedly, by a subsequent private Act of 50 Geo. 3, c. cxxxii., or at all events by the provisions of the Waterworks Clauses Act, 10 & 11 Vict. c. 17,—2. That, assuming that the company had the power they claimed, they were bound to exercise it in a proper manner, and are responsible for any excess committed by their servants or agents or persons intrusted by them with the execution of their warrants.

Now, I will deal with the last point first. It is undoubtedly true that a master is in general responsible for the acts of his servants, provided their acts are done within the fair scope of the

(1) 11 C. B. (N.S.) 579. (2) 11 C. B. (N.S.) 814.
(3) 46 Geo. 3, c. cxix.

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duty of the servants: and I have no desire to question the propriety of the decision in the case which has been relied upon for that proposition, viz. *Bayley* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (1) But here it was no part of the duty of the bailiff or his man, who were only authorized to levy the rate due to the company, to commit an assault upon the plaintiff. I think the ruling of the learned Baron upon that point was perfectly correct.

The second point was a more complicated and difficult one: but, though the language is not at first sight very clear, I have come to the conclusion that the provisions of the several Acts referred to shew clearly that the learned Baron was right upon that point also. The history of the company is this:—By a private Act of 46 Geo. 3, c. cxix., the company were impowered to make agreements for the supply of water to individuals; and by s. 59 of that Act it was provided that in case of default in payment of *the agreed sum*, the company, in addition to the power to stop the supply of water to the premises, might recover the rate by distress and sale of the goods of the defaulter. The question is whether that power still survives. It is contended on the part of the plaintiff that it does not. The next Act is the 50 Geo. 3, c. cxxxii., which, reciting the previous Act, enacted in s. 13 that the company were "only to take and demand *such sums as should be reasonable* for the water supplied under the provisions of that Act." Nothing, however, is said about withdrawing the power of distress if the consumer should fail to pay such reasonable sum. Mr. Castle was driven to contend that by the effect of that provision the power of distress was gone, because the subject-matter, viz. the rate payable *by agreement* was taken away, and a reasonable sum substituted. I am not of that opinion. I think the 50 Geo. 3, c. cxxxii., has no such operation: s. 13 only intended to alter the mode of ascertaining the amount of the rate, and not the mode of enforcing payment of it; leaving the power of distress as it was before.

So matters remained until the year 1847. In that year the Waterworks Clauses Act, 10 & 11 Vict. c. 17, was passed. In that statute there is a code of sections, beginning with s. 68, providing

(1) Law Rep. 7 C. P. 415; 8 C. P. 148.

for the recovery of rates. Sect. 74 of that Act provides that, "if any person supplied with water by the undertakers, or liable as herein or in the special Act provided to pay the water-rate, neglect to pay such water-rate at any of the said times of payment thereof, the undertakers may stop the water from flowing into the premises in respect of which such rate is payable, by cutting off the pipe to such premises or by such means as the undertakers shall think fit, and *may recover the rate due* from such person, if less than 20*l.*, with the expenses of cutting off the water and costs of recovering the rate, *in the same manner as any damages for the recovery of which no special provision is made are recoverable by this or the special Act*," &c. Now, that throws us on to s. 85, which provides, that, "If the waterworks be in England, the clauses of the Railway Clauses Consolidation Act, 1845, with respect to the recovery of damages not specially provided for, and of penalties, &c., shall be incorporated with this and the special Act," viz. by two justices. Mr. Castle contends that that power is substituted for the power conferred upon this company by 46 Geo. 3, c. cxix., s. 59, and consequently that the warrant here was illegal. If that be the result of the legislation, Mr. Castle's argument must prevail. It is to be observed, however, that the Railway Clauses Consolidation Act was passed in the year 1845, and the Waterworks Clauses Act in 1847. But there is a subsequent special Act, 15 & 16 Vict. c. ccix., passed in 1852, which recites 46 Geo. 3, c. cxix., and 50 Geo. 3, c. cxxxii., as existing Acts, and by s. 48 expressly enacts, that, "except by this Act expressly provided, this Act or anything therein contained shall not repeal, alter, interpret, or in any manner affect, any of the provisions in force at the commencement of this Act or of the recited Acts or any of them; and, except only so far as is requisite for the execution of this Act, all those provisions, and all powers, privileges, exemptions, and immunities of or for the benefit of any person or corporation thereby respectively created, confirmed, or saved, shall be and continue as valid and effectual as if this Act had not passed." There being, then, no express repeal of s. 59 of the Act of 46 Geo. 3, but, on the contrary, an express recognition of that Act in s. 48 of the special Act of 1852, and a saving, as it seems to me, of the provision in question, I am clearly of opinion that the

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company's power to issue their own warrants for the recovery of arrears of rates has not been taken away or in any manner interfered with by the subsequent legislation; and that the ruling of the learned Baron upon this point also was right.

SMITH, J. I am of the same opinion. It is conceded that under 46 Geo. 3, c. cxix., s. 59, the company had power to issue their own warrants to recover arrears of water-rate. But it is said that that power only existed where there was an agreement between the company and the consumer for the payment of the rate; and that, if there is no agreement, there can be no distress under that clause; and that as by s. 13 of 50 Geo. 3, c. cxxxii., the company can only take and demand "such sums as shall be reasonable" for the water supplied, and the supply therefore, being no longer by "mutual agreement," the power of distress conferred upon the company by the earlier Act ceases to exist. But by another special Act of the same company reciting the two former Acts of 46 & 50 Geo. 3, viz. 15 & 16 Vict. c. clix., passed in 1852, it is enacted in s. 48 that all the powers in the Act of 46 Geo. 3, so far as they are not repealed by that Act, and to the extent to which they are not repealed, shall continue as valid and effectual as if that Act had not passed. How can it be said that the power of distress given by 46 Geo. 3 is not kept alive? I think it is impossible so to hold. I agree with my Lord that the nonsuit was right upon both points.

Motion refused.

Solicitors for plaintiff: *Irwin & Nash.*
Solicitors for the company: *Baileys, Shaw, & Gillett.*
Solicitor for defendant Newton: *W. E. Ruddle.*

J. S.

[IN THE COURT OF APPEAL.]

1885
Aug. 5.

LOWE *v.* FOX.

Lunatic—Custody—Order for Detention—Order for Discharge—8 & 9 *Vict. c.* 100, *ss.* 72, 99—16 & 17 *Vict. c.* 96, *s.* 4, *sched. A. No.* 1—*Limitations, Statute of* (21 *Jac.* 1, *c.* 16), *ss.* 3, 7—*Married Woman*—"*Discovert*"—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75).

The plaintiff was detained in a private asylum for lunatics, of which the defendant was superintendent, under an order signed by her husband. In the statement annexed to the order the question "Whether first attack," was answered thus: "For the last twenty years has been subject to what is termed hysteria;" and the question, "When and where previously under care and treatment," was answered, "During this period of twenty years has been constantly under treatment":—

Held, that the order, together with the statement, was sufficient under 16 & 17 Vict. c. 96, s. 4, sched. A (No. 1), and afforded a defence under 8 & 9 Vict. c. 100, s. 99, to an action for an assault and false imprisonment.

The plaintiff's husband, having received a letter from the Commissioners in Lunacy intimating that she ought to be discharged, wrote to the defendant as follows: "After the Commissioners' letter I suppose that I must consent to Mrs. Lowe's discharge, and beg you will carry out their suggestion as soon as you may think it advisable":—

Held, that the letter of the plaintiff's husband was not an order of discharge within 8 & 9 Vict. c. 100, s. 72.

A married woman can maintain in her own name an action for an assault and false imprisonment committed before the coming into operation of the Married Women's Property Act, 1882, even although the cause of action accrued more than four years before suit, provided the action be brought within four years after the coming into operation of that statute, for she thereby has become "discovert" within the meaning of 21 Jac. 1, c. 16, s. 7.

ACTION for an assault and false imprisonment. The writ of summons was issued on the 6th of May, 1884. The defendant, by his defence, relied upon 8 & 9 Vict. c. 100, ss. 99, 105, and 21 Jac. 1, c. 16, s. 3.

The action came on for trial before Pollock, B., and a special jury at the winter assizes, 1885, held for Somersetshire, when the following facts were proved or admitted:—

The plaintiff was the wife of the Rev. George Lowe, a clergyman of the Church of England, to whom she was married in the year 1842. In September, 1870, the defendant and his father were joint licensees of a private lunatic asylum named Brislington

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House, situate near Bristol, but the defendant's father was the proprietor of it, and the defendant himself was the salaried medical officer and superintendent. In that month the plaintiff was admitted as a patient into Brislington House under an order signed by her husband, and certificates signed by two medical practitioners. It was not contested that the certificates were in due form, but it was alleged that the statement accompanying the order for admission was insufficient under 16 & 17 Vict. c. 96, sched. A. (No. 1), in the following particulars: To the question, "Whether first attack," it was answered, "For the last twenty years has been subject to what is termed hysteria"; to the question, "Age, if known, on first attack," it was answered, "Thirty"; to the question, "When and where previously under care and treatment," it was answered, "During this period of twenty years has been constantly under treatment." The answer last named was afterwards amended by the plaintiff's husband, who added to it the words, "for hysteria," together with the names of several medical practitioners who had attended upon her. The consent of the Commissioners in Lunacy to this amendment (which was rendered necessary by 16 & 17 Vict. c. 96, s. 11) was not obtained. The plaintiff was detained under this order together with the accompanying statement and the certificates until January, 1871. In that month the Commissioners by letter intimated to the plaintiff's husband that they considered that she should be discharged from the asylum. Thereupon, on the 20th of January, 1871, the plaintiff's husband wrote to the defendant a letter, which, after informing him of the letter from the Commissioners, proceeded as follows: "After the Commissioners' letter I suppose that I must consent to Mrs. Lowe's discharge, and beg you will carry out their suggestion as soon as you may think it advisable. Mrs. Lowe will require 10*l.* to take her to London. I enclose a cheque, and should feel greatly obliged by your cashing it for her." Notwithstanding this letter from the plaintiff's husband, the defendant detained her at the asylum until the month of February.

Pollock, B., was of opinion that the order, together with the statement, was in due form, and protected the defendant; that the letter of the plaintiff's husband was not an order for the

plaintiff's discharge within s. 72 of 8 & 9 Vict. c. 100; and that the acts complained of were done pursuant to 8 & 9 Vict. c. 100, and 16 & 17 Vict. c. 96; that there was no evidence that the defendant had acted maliciously, and that the plaintiff was barred by 8 & 9 Vict. c. 100, s. 105. He, therefore, without calling upon the defendant to proceed with his case, directed a verdict to be found for him, and entered judgment for him.

The Queen's Bench Division (Grove and Denman, JJ.) granted a new trial on the ground that there was some evidence fit to be laid before a jury, that the defendant had not acted bonâ fide in pursuance of the statutes 8 & 9 Vict. c. 100 and 16 & 17 Vict. c. 96.

The defendant appealed.

Aug. 3. *Edward Clarke, Q.C.* (*R. O. B. Lane*, with him), for the defendant. If the documents relating to the plaintiff's detention in the asylum of which the defendant was superintendent were in due form, he may plead them by way of justification as a defence to the present action under s. 99 of 8 & 9 Vict. c. 100; that is to be read together with 16 & 17 Vict. c. 96, pursuant to s. 37 of that statute. The only document impugned is the "statement," and this is distinct from the order to detain, and is not to be considered as part of it. It will not be disputed by the plaintiff that the order itself is in due form, according to the provisions of 16 & 17 Vict. c. 96, s. 4, sched. A. (No. 1), and therefore it is a complete defence to the action, any irregularity in the statement being immaterial. But further, it is submitted for the defendant that even although the statement is to be read as part of the order, and although any irregularity in the statement vitiates the order, nevertheless the statement itself is also in due form. The statement requires an answer to the particular, "Whether first attack." In the present case the answer is, "For the last twenty years has been subject to what is termed hysteria." That is equivalent to the following answer by the person signing that statement: "If hysteria is madness, she has been mad for twenty years; but I do not know whether hysteria is or is not madness." The plaintiff will contend that the only lawful answers are "Yes," "No," and "I do not know." But this is a most unreasonable construction of the statute. The plaintiff further

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complains that the answer to the particular, "When and where previously under care and treatment," is insufficient: the answer was "During this period of twenty years has been constantly under treatment," to which the following words were afterwards added, "for hysteria," together with the names of certain medical men who had attended the plaintiff. The consent of the Commissioners in Lunacy was not obtained for this addition pursuant to 16 & 17 Vict. c. 96, s. 11; but surely the answer, as it originally stood, was sufficient. The plaintiff will contend that the smallest deviation from the form contained in sched. A. (No. 1) of 16 & 17 Vict. c. 96, of however trivial a nature it may be, will vitiate the order; but for the defendant it is contended that it will be sufficient if the statute is substantially complied with. Perhaps no decision under the above statute as to the effect of an alleged inaccuracy in an order is to be found; but authorities may be found as to what irregularity will or will not avoid a certificate. In *Reg.* v. *Pinder, In re Greenwood* (1), it was held that a certificate of a surgeon and apothecary, which merely stated the name of the town where he had examined the patient, was invalid; but that was a case of complete deviation from the form given by the statute, which requires the name of the street and number of the house, or other particulars of the like kind, to be stated. *In re Shuttleworth* (2) was a decision upon 8 & 9 Vict. c. 100, ss. 45, 46, which have been repealed by 16 & 17 Vict. c. 96, s. 3; but so far as the decision goes, it assists the argument for the defendant.

But, further, the present action is barred by the Statute of Limitations (21 Jac. 1, c. 16), s. 3, for the alleged assault and false imprisonment took place considerably more than four years before the writ of summons was issued. It is true that by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), a married woman may sue alone for a tort committed before that Act came into operation: *Weldon* v. *Winslow* (3); and no doubt, upon the passing of that Act, the plaintiff became in one sense "discovert"; but she did not become "discovert" within the meaning of 21 Jac. 1, c. 16, s. 7, for in that enactment the word refers to the death of the husband of the married woman, and at

(1) 24 L. J. (Q.B.) 148. (2) 9 Q. B. 651; 16 L. J. (M.C.) 18.
(3) 13 Q. B. D. 784.

the time of action brought the husband of the present plaintiff was still alive.

[LORD ESHER, M.R. The substance of the objection last urged on behalf of the defendant is that the action is really brought too soon, and not too late.]

The plaintiff in person was directed to confine her argument to the question, whether her detention in the asylum had been lawful under 16 & 17 Vict. c. 96. The words "care and treatment" occurring in the question, "When and where previously under care and treatment," are technical words, and imply that information must be given whether or not the patient has been previously insane, or at least mentally deranged; they do not refer to an illness of a slight nature, such as hysteria. The answer did not state whether the plaintiff had been under "care." Again, the only lawful answers to the question, "Whether first attack," are "Yes," "No," or "I do not know." These are serious defects in the statement and render it bad; and the statement being part of the order for detention, the order itself is bad. The slightest disobedience to the requirements of the statute will render the detention of a patient illegal.

At all events the detention of the plaintiff after the letter of her husband dated the 20th of January, 1871, was unlawful: the husband had under 8 & 9 Vict. c. 100, s. 72, power to order the discharge of the plaintiff: his letter was in truth an order to discharge her; nevertheless, she was detained by the defendant for some weeks afterwards.

Edward Clarke, Q.C., in reply. The letter of the plaintiff's husband was not an order or direction to discharge her: it merely allowed the defendant an option to discharge her.

Cur. adv. vult.

Aug. 5. The following judgments were delivered:—

LORD ESHER, M.R. The plaintiff, being a married woman, has brought this action against the defendant, who is responsible for the management of an asylum, and the ground of action is that she has been wrongfully detained therein as an alleged lunatic. At the trial Pollock, B., was of opinion that no evidence

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was given to support the plaintiff's case, and thereupon he directed a verdict for the defendant. The Divisional Court took a different view; but we have the documents before us, and upon considering those documents, we are of opinion that the order of the Divisional Court granting a new trial was wrong, and that the direction of Pollock, B., was right.

I will in the first instance dispose of the second point urged upon the defendant's behalf. It was argued that the plaintiff was not in a position to sue at all, because this action was too late, and that at the date when the writ of summons was issued the cause of action was barred by lapse of time. It was urged that under the old law a married woman might bring an action for a bodily injury without joining her husband, that she could be defeated only by a plea in abatement, and that her inability to obtain judgment, if a plea of abatement was pleaded, was not equivalent to a total disability to sue; and that the plaintiff is not "discovert" within the meaning of the Statute of Limitations, and therefore she cannot maintain the action, more than four years having elapsed since her detention; but the Married Women's Property Act, 1882, was intended to confer upon a married woman the right to sue alone without being compelled to join her husband, and the present plaintiff could not have brought this action in her own name until the 1st of January, 1883, and therefore this action, if it be otherwise maintainable, is in time.

The first and main point argued on behalf of the defendant was, whether the order for the detention of the plaintiff signed by her husband was in due form; and it was said that the order was one thing and the statement another, and that if the order was in due form, it was not material that the statement was not in due form. But the statement is part of the order itself, and the question is whether the statement is sufficiently accurate, that is, whether it is substantially accurate. A difficulty arises from the over-scrupulousness of the husband in his desire to be accurate, and we have to consider how far the document signed by him is in conformity with the form given in the schedule to the statute: that is, in other words, whether the answers to the questions, which were to be answered in that statement, or rather whether

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the statements of the particulars mentioned are sufficiently accurate within the meaning of the statute. I cannot help thinking that the question must always be whether, if I take the language in its ordinary sense under the circumstances in which it was used, it is substantially accurate so that no ordinary person could mistake what the meaning of it was. There is a difficulty as to this statement, which arises, as I have said, from the too great scrupulousness of the husband.

Then comes the question, whether if I take the circumstances under which this statement has been made, it is substantially in conformity with what is required by the schedule. One of the questions is, "Whether first attack." That is, whether the attack of lunacy, which is alleged to be the cause of the order, is the first attack. One answer might be, "No, not the first attack." Another answer might be, "Yes, the first attack." Now, the answer given here is neither "Yes" nor "No." It is, "For the last twenty years has been subject to what it is termed hysteria." Then there must, I think, be read with that the answer to a subsequent part of the form: "When and where previously under care and treatment?" That answer is, "During this period of twenty years has been constantly under treatment." If I take into account the fact that it is not alleged that the plaintiff ever had been absolutely a lunatic at all, if indeed she was on the occasion when this order was made, what is the ordinary meaning of that? "For the last twenty years has been subject to what is termed hysteria." If I read that fairly on behalf of the husband, as well as fairly on behalf of the wife, it seems to me that it is equivalent to this: "Yes, it is the first attack, although for the last twenty years she has been subject to what is termed hysteria." That is the ordinary reading to my mind of that answer. That is what anybody would clearly understand from it. Therefore the answer is, "Yes, it is the first attack, although for the last twenty years she has been subject to what is termed hysteria." Then another question is, "Age, if known on the first attack?" Answer, "Thirty." "When and where previously under care and treatment?" Now, if the answer to the former question had been that it was not the first attack, then there would have arisen a question upon this, "When and where previously under care and treatment?" And

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it was urged that the answer is not sufficient, because it says, "During this period of twenty years has been constantly under "'treatment.'" But it may be said for the defendant that although the plaintiff had been under "treatment," she might not have been under "care," and that unless she had been under both care and treatment, there was no occasion to answer that question more particularly than it has been. But the truth is that the question what would be the proper answer to that inquiry, what would be the proper statement, is not material; because if we once come to the conclusion that the answer to the question, "Whether this is the first attack?" is "Yes," then, "When and where previously under care and treatment?" is an immaterial matter. I will venture to say that any person filling up that particular, "When and where previously under care and treatment?" where the patient has been a lunatic, should answer according to the most accurate truth. Suppose that a person has had attacks, illusions, or delusions, which may be deemed to be insanity, but has been treated at home and has never been put under what would be called "care"; in my opinion the proper and honest answer would be to say so, to say that he or she has been treated for these delusions, for the lunacy which occurred before, has been treated by medical men (who are named), but that he or she has not been put under any peculiar care and has been kept at home.

But if I construe this statement in this manner, it follows that it is substantially correct within the form given in the schedule to the Act of Parliament. Therefore, the order including the statement is right within the meaning of the Act of Parliament.

Then it was said that a letter written by the husband was an order for the lady's release, and that the Act of Parliament says that where the person at whose request she was put into a private lunatic asylum gives an order she should be released, she must be released forthwith, and that if she is not released forthwith, she suffers at law an injury for which she would be entitled to a remedy. Now in my opinion that contention, if what is written is an order for her release, is true. I think that those who have charge of a private lunatic asylum, if they get a proper order to release a patient, have no discretion and no power of saying, "We do not think it is for her good that she should go out to-day; We think we shall obey this order by letting her out to-morrow,

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or the day after." It seems to me that they have no such discretion and no power. Their duty is to release her forthwith—not cruelly or against her objection, for instance, on a wet or inclement night, or to send her out without any means of getting forward at a late hour of the night—but when any reasonable man would say without any hesitation, "He or she shall go as soon as possible." That is what ought to be done when an order of discharge is received. Therefore if the letter of the husband in this case had been an order to discharge the lady, I should have said that she ought to have been discharged forthwith, and that as she was detained longer, she would have had a right of action in that respect; but upon a careful consideration of that letter, I think the husband flinched from taking the responsibility. He was told that the Commissioners thought the plaintiff ought to be discharged, and was asked for an order to discharge her. But it seems to me that he flinched from that responsibility, and attempted to throw that responsibility upon the keeper of the asylum, and that his letter to the keeper of the asylum was not an order to discharge the plaintiff, but a request to him to consider whether she ought to be discharged. That is not an order. Therefore there was no order by the husband for her release.

Under these circumstances the order to confine her in the lunatic asylum being in due form and according to the Act of Parliament, there was no cause of action in respect of the original confinement, and inasmuch as the husband gave no order for her release, there was no cause of action in respect of her being detained after an order for her release. I have therefore come, after consideration of this matter, to the conclusion, that the direction of Pollock, B., to the jury was right according to law, and that we cannot agree therefore with the decision of the Divisional Court which they gave, I think, with considerable doubt. We cannot agree with them that there was any cause of action, for which this lady would be entitled to a new trial. I think, therefore, the judgment of Pollock, B., must be restored, and that the judgment of the Divisional Court must be reversed.

BOWEN, L.J. I should not add anything if it was not for our practice, when we differ with the Court below, that all the judges

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of this Court should address their minds to the subject and give separate judgments.

The first point taken on behalf of the appellant was, that this action was brought too late, that the cause of action which had vested in the wife had been barred by the Statute of Limitations, 21 Jac. 1, c. 16, and that therefore the wife could not sue. The Act of Parliament in question, 21 Jac. 1, c. 16, makes four years the limit, beyond which actions of trespass, imprisonment, assault or battery, shall not be brought; but by s. 7, it releases from this fetter persons who are under coverture or under certain other disabilities, which are included in the same section. In such a case if a woman who is covert, that is to say, if a woman who is married, is the subject of the wrong, she gets liberty to bring an action within such times as are before limited, after her becoming discovert; that is to say, she has four years from the date of her discoverture to bring an action for assault and false imprisonment. Now the difficulty in this case which presents itself in the way of this point is, that the lady is not discovert at the present moment; so that the objection that she is bringing her action too late seems ill founded; it really is, she is bringing her action too early, because her husband is still alive, and when the objection is stated in that shape, it is obvious that it must fall to the ground, because at common law, unless there was a plea in abatement, a woman could sue for a wrong done to her during marriage. And there being no plea in abatement in this case, I cannot see how the defendant's counsel could maintain that the action did not lie. But apart from that mode of answering the objection, I am prepared, as the Master of the Rolls has done, to say that a woman has become discovert within the meaning of s. 7, as soon as the Married Women's Property Act, 1882, enabled her to sue; by that statute she was released, not indeed from her marriage or from coverture in every sense, but from coverture in the sense which incapacitated her from suing except subject to a plea in abatement, and as four years have not elapsed since the time when the Married Women's Property Act, 1882, came into operation, the lady, it seems to me, would be in time. So either the objection is taken too soon, or it is not an objection that can prevail; that is to say, either the lady is at law able to

sue, or at all events the Statute of Limitations has not disentitled her to do so. I have now disposed of the first objection.

Then I come to the real point that was argued at length in the case, namely, whether this statement, which was annexed to the order received by the defendant when he took the plaintiff into his keeping, is a statement which fulfils the requirements of the Act. Now I think, myself, as the Master of the Rolls has said, that the statement becomes part of the order, that is to say it becomes attached to the order by the very language of s. 4, of 16 & 17 Vict. c. 96. The section is that no person who is not a pauper is to be received into a licensed house without an order under the hand of some person according to the form in the schedule, together with a statement of particulars, nor without medical certificates. That is to say, two separate and independent documents are to be presented at the lunatic asylum or the licensed house. There are two documents, but the reason that the statement is not made a third is, because by the very language of the section it is attached to the order. The patient is not to be received as a lunatic into a licensed house without an order in the form annexed to the Act, together with a statement of particulars. When I come later to that part of the section which creates the misdemeanor, it is in these terms: "Every person who shall receive any such person as aforesaid . . . . without such order and medical certificates as aforesaid, shall be guilty of a misdemeanor." "Such order" means in the form annexed to the Act together with the statement, which in the previous portion of the section has been directed to accompany the order. The statement in the form pointed out by the schedule is a condition precedent to the power of the keeper of the house to receive the private patient. Now the statement must be accurate, and it must be truthful, and also it must be unambiguous, that is to say, it must be such that a reasonable person can read and understand it. And what we have had a difficulty about in this case, is to consider whether this statement is framed with sufficient clearness and lucidity for any reasonable person to understand it. We must recollect that these orders are orders which are to be read with reference to persons who are supposed to be of unsound mind, and are to be presented to persons who

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are about to receive them, and, after reflection, I have come to the same conclusion as the Master of the Rolls, namely, that the difficulty in this statement was caused in the first instance by the over zeal, the over anxiety of the husband, to give the fullest possible particulars; and I think that it may be seen, not only from the answers to the questions which have been before us, but also from the answer to the question about suicide, where the husband answers exactly in the same way. Instead of saying that she had no suicidal tendency, he said that during the period during which she was subject to hysteria, the lady took large doses of laudanum, but in his opinion not with the intention of destroying life. He ought to have answered "No;" but, in order to be quite safe, and to give the fullest information about his wife, he gives an elaborate statement which really is what one may call a literary equivalent to the negative answer, only extended for the purpose of information. If I read the statement carefully, I think that his answer to the question, whether this was the first attack, is equivalent to saying: "This is the first attack, but lest anybody should be misled by thinking she has never before had the faintest indication of anything that might bear on the malady from which she is supposed to be suffering, I mention that for the last twenty years she has been subject to what is termed hysteria."

Then I come to the second question, the insufficiency of which is alleged: "When and where was she previously under care and treatment?" "Care and treatment" are words of medical significance: "care and treatment" are used with regard to a person whose mind is suffering, and who therefore is not suffering in body only; for if the person had been suffering in body, "treatment" might have been enough, but "care" being a word appropriate to the detention and the reception and maintenance of lunatics, is added in the question. I think the answer means this: "She has never been under 'care' in the sense of the question, but she has had medical treatment for hysteria." And it is in effect framed in this manner: "During this period of twenty years, during which" (if we read the first question as we have read it,) "she has been suffering from hysteria, and not from dementia, that is, during the last twenty years, she has been

constantly under treatment." I think on the whole, reading that reasonably, as anybody would read it to whom it was presented, that the question was sufficiently answered within the meaning of the Act. If so, the learned Baron at the trial was right in directing the verdict of the jury on that point.

Then comes the question as to whether there was an order to release her. That depends upon this, namely, whether the letter which has been read to us and commented upon by the plaintiff with great ability, was a direction within s. 72 of the Act of 8 & 9 Vict. c. 100. That section enables the person who has imprisoned the lunatic to order her discharge, and if, on receiving an unequivocal order from the person who had shut her up, the plaintiff had been still detained by the defendant, it seems to me that she would have had a grievance, because the section states that in such a case the patient is forthwith to be discharged or removed as the person who signs the order shall direct. "Forthwith" of course means "at once," having regard to the circumstances of the case. A reasonable time must be given for compliance, but only for compliance under the section; and if there had been a direction, the lady ought to have been discharged at once. But the direction was not unequivocal. It threw the burthen upon the defendant of forming an opinion as to what should be done. It was a direction not that she should be discharged forthwith, but that the defendant, who was the person responsible for her detention, should carry out the suggestion of the Commissioners, "to discharge her as soon as he might think it advisable." Now that is not an unequivocal order for the discharge. Supposing the lady was suffering from an acute attack of dementia, if the defendant had discharged her, a complaint could have been made against him. The husband would say, "It was left to you to say whether it was desirable: I did not order her to be discharged: I ordered her to be discharged as soon as you considered it advisable." That is not an order which could be acted upon immediately, and leaves something still to be done by the defendant before he acts upon it. As soon as the defendant thought it advisable, then no doubt the order would take effect. But so long as he, on any reasonable ground, did not think it advisable, the document would not take

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effect as an order, and the plaintiff's detention would not be illegal.

Under these circumstances, I think that we should restore the judgment of Pollock, B., at the trial, and discharge the order of the Divisional Court for a new trial.

Judgment for the defendant.

Solicitors for defendant: *Mead & Daubeny, for Fox & Whittuck, Bristol.*

J. E. H.

June 25.

[IN THE COURT OF APPEAL.]

TOZIER AND WIFE *v.* HAWKINS.

Practice—Writ for Service out of Jurisdiction—Injunction—Jurisdiction of Court—Libel—Rules of Supreme Court, 1883, *Order* XI., *r.* 1 (*f*).

A writ of summons claiming an injunction to restrain the defendant (resident out of the jurisdiction) from sending libels to the plaintiff (residing within the jurisdiction) and publishing the same within the jurisdiction, and claiming also damages, may, by leave of the Court, be issued and served upon the defendant, at least if it does not appear that the defendant never comes within the jurisdiction.

Judgment of the Queen's Bench Division (ante, p. 650) affirmed.

APPEAL of the defendant from the refusal of the Queen's Bench Division (Lord Coleridge, C.J., and Cave, J.) to set aside the writ and all proceedings thereunder. The ground of the motion in the High Court was that the Court had no jurisdiction to allow the service of the writ. The proceedings before the Queen's Bench Division are reported (1), and here it is only necessary to make the following short statement of the facts:—

The action was brought for an injunction to restrain the writing and publication of libels upon the plaintiffs, and for damages. The defendant was domiciled and wholly resident in Ireland. By a judge's order leave had been given to the plaintiffs to serve the defendant at Dublin, in Ireland, with the writ of summons. The alleged cause of action was the posting at Dublin of libellous postcards upon the female plaintiff, directed to and received by

(1) Ante, p. 650.

her at Fulham, Middlesex, where she was residing with her husband, the male plaintiff. The defendant appeared to the writ; but no affidavit had been filed on his behalf stating that he never came to England.

Winch (*Finlay, Q.C.*, with him), for the defendant. There was no power to give leave to serve the writ out of the jurisdiction: the defendant is resident out of the jurisdiction, and is not amenable to the ordinary process of the Court.

Henn Collins, Q.C., and *R. A. McCall*, were not called upon to argue for the plaintiffs.

BRETT, M.R. I am of opinion that there was jurisdiction under Rules of the Supreme Court, 1883, Order XI., r. 1 (*f*) to give leave to serve the writ in Ireland. The plaintiffs claim by the indorsement upon the writ of summons (1) to restrain or prevent the publication of libels in England. It has been in effect urged that the High Court has no power to enforce the prayer for an injunction; but the defendant has not filed any affidavit shewing that he never comes to England; and if the injunction is granted, it can be enforced, whenever he comes within the jurisdiction.

BAGGALLAY and BOWEN, L.JJ., concurred.

Appeal dismissed.

Solicitor for plaintiffs: *John Hayward.*
Solicitors for defendant: *Pickett & Mytton.*

(1) Ante, p. 650.

J. E. H.

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Aug. 12.

IN RE PLAYER. EX PARTE HARVEY, TRUSTEE.

Bankruptcy—Voluntary Settlements—Gift of Money to a Son—"Settlement of Property"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

A gift of money to a son, made for the purpose of enabling him to commence business on his own account, is not a "settlement of property" within the meaning of s. 47 of the Bankruptcy Act, 1883, which renders such settlements void in certain specified cases as against the trustee in the bankruptcy of the settlor.

APPEAL from an order in bankruptcy made by the deputy judge of the County Court of Glamorganshire holden at Swansea.

Edward Player having been adjudicated a bankrupt in March, 1883, the appellant, the trustee in bankruptcy of his estate, gave notice of motion in the county court to E. O. Player, a son of the bankrupt, for an order declaring that an advance of 650*l.* made by the bankrupt to E. O. Player was void as against the trustee under s. 47 of the Bankruptcy Act, 1883, and that E. O. Player might be ordered to pay that sum to the trustee.

At the hearing of the motion the answers of E. O. Player on his examination, and an affidavit by the trustee, were used in evidence, and disclosed the following facts:—

Edward Player, the bankrupt, about two years and a half before his first public examination on the 20th of March, 1885, advanced to his son, E. O. Player, the sum of 650*l.* in order to provide the stock in trade necessary to enable the son to commence carrying on business as a manufacturer of builder's materials at Swansea. There was no consideration for this advance; and no evidence was offered that at the time of the advance the bankrupt was able to pay all his debts without the aid of the sum advanced. The son at that time was twenty-two years of age, and had not previously carried on business on his own account. He had saved 150*l.* whilst employed as a clerk in a timber merchant's office, and he added that sum to the sum of 650*l.* advanced by his father—the two sums constituting his capital in the business. The stock-in-trade cost 650*l.*, and he paid 150*l.* into a bank to be drawn upon from time to time according to the requirements of the business.

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At the date of his father's bankruptcy the capital in E. O. Player's business consisted of stock in hand of about the value of 250*l.*, and outstanding debts due to E. O. Player to the amount of about 250*l.*, and there were no debts owing by E. O. Player except a sum of 20*l.* for rent. He had lived with his father, who provided him with all necessaries except clothes, up to August, 1884, when he left his father's house and thenceforth paid for his own maintenance.

The deputy judge held that the advance of 650*l.* by the bankrupt to E. O. Player was not a settlement of property within the 47th section of the Bankruptcy Act, 1883, and dismissed the motion.

The trustee appealed.

Cooper Willis, Q.C., for the trustee. This was a settlement of property within s. 47. (1) It was a "transfer" of money to E. O. Player, and by s. 168 "property includes money," &c. The trustee is entitled to follow the 650*l.*, and to have paid to him the 500*l.* representing the capital remaining in the business, though he is willing to deduct the 150*l.* which belonged to E. O. Player when he commenced business.

P. Gye, for E. O. Player. It is impossible to follow the sum of 650*l.* under the circumstances which exist. The sum now remaining as capital in E. O. Player's business only represents the profits on particular transactions, and cannot be identified

(1) Sect. 47 of the Bankruptcy Act, 1883, enacts that:

"(1.) Any settlement of property, not being a settlement made before or in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof."

"(3.) 'Settlement' shall for the purposes of this section include any conveyance or transfer of property."

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with any part of the 650*l*. But it is further contended that a gift of money to a son for the purpose of advancing him in life is not within s. 47. [He was stopped.]

MATHEW, J. I am of opinion that this appeal must fail. It is said that the gift from the bankrupt to his son was a settlement of property within s. 47 of the Act of 1883, and therefore void. It is contended that the trustee is entitled, upon the true interpretation of the Act, to follow the sum given by the father; to shew that it was used by the son as capital in the business which he carried on, and to call upon the son, if any capital remained in the business, to pay it over to the trustee. The trustee's counsel proposed to give credit to the son for the sum belonging to him when he started in business; and with respect to that proposal the observation occurs to one that it is singular the trustee should be so moderate in his demands, considering that if his contention be well founded, he is entitled to the whole sum remaining as capital in the business. But I am of opinion that the Act of Parliament never intended to give such a right as the trustee claims, because if transactions of this kind, which certainly are not morally wrong, are included in the operation of s. 47, all gifts from a father to a son for his advancement in life could be recovered from the unfortunate son at any time within ten years if the father became bankrupt, unless the son could shew that his father was able to pay all his debts without the aid of the gift at the time it was made. It was contended that this was a "transfer of property" within sub-s. 3 of s. 47, and by the interpretation clause in the Act "property" includes money. I think the meaning of sub-s. 3 is that where money is settled as property it may be recovered by the trustee in the same way that property which is ordinarily the subject of settlement might be. It would be impossible to put on sub-s. 3 the construction contended for on the trustee's behalf without rendering void many transactions which, as matter of moral obligation, are perfectly proper and right. It is also said that the money given to the son can be traced as forming part of the capital remaining in the business. I think it cannot be traced. What is left merely represents the profits on particular transactions in the business.

The legislature cannot have intended s. 47 to cover a case like the present, where it becomes a very nice question whether the sum left forms any part of the original 650*l.* given to the son.

CAVE, J. I am of the same opinion. The history of these provisions with respect to fraudulent conveyances and transfers of a bankrupt's property is shortly this:—By s. 5 of the statute 1 Jac. 1, c. 15, fraudulent transfers by bankrupts were prohibited, and in 1802 the case of *Ex parte Shorland* (1) was decided upon that section. The question in that case was whether a sum of money advanced by a father to his son was within the statute. It was contended for the assignees that the gift was within the terms of the statute. On the other hand it was said that it would be very hard to consider such a gift within the statute, which would then extend to any gift to a son at school or college to pay his debts, &c. The Lord Chancellor held that a mere gift of money was not within the statute. Undoubtedly s. 5 of that Act did not contain the word "money." Next came the case of *Kensington* v. *Chantler* (2), decided in 1813. There money was given by a father to his son to advance him in a trading concern; and, in an action by the father's assignee in bankruptcy to recover the sum so advanced, the question was argued whether the voluntary gift of the father, who was a trader, to the son was within the statute. The report states that the plaintiff's counsel "contended that it was, and cited *Ex parte Shorland* (1), where the Lord Chancellor seemed to think that a gift of *money* might be brought within the statute, though it was not so in that case; and according to Nicholas, J., in *Tucker* v. *Cosh* (3) the statute ought to receive a large construction, because it was made for the good of the commonwealth; but" (the report goes on to say) "Lord Ellenborough, C.J., observed that the statute had not the word 'money,' and seemed to be confined to things which were the subject of conveyance, and capable of being conveyed, or procured to be conveyed, and that the doctrine contended for would go the length of making a son liable to refund every portion of money given to him by his father for his maintenance."

(1) 7 Ves. 88. (2) 2 M. & S. 36.

(3) Styles, 289.

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The Court accordingly directed a nonsuit. The next statutory provision on this subject is s. 126 of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), which provides that "if any bankrupt, being at the time insolvent, shall (except upon the marriage of any of his children, or for some valuable consideration) have conveyed, assigned, or transferred to any of his children, or to any other person any hereditaments, offices, fees, annuities, leases, goods, or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person or into any other person's name, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy; and every such sale shall be valid against the bankrupt, and such children and persons, and against all persons claiming under him." In that section, again, the word "money" does not occur. The section obviously contemplates the continued existence of the thing conveyed or assigned, and gives the Court power to order it to be sold for the benefit of creditors. Then comes the Bankruptcy Act, 1869, and I think that the words of s. 91 are substantially similar to the words used in s. 47 of the Act of 1883, which we have to consider in the present case. The words are "any settlement of property," which includes "any transfer or conveyance," and by the interpretation clause in both statutes "property" includes money. It is contended that by virtue of the interpretation clause in the Act of 1883, when applied to s. 47, every gift by a father to children, if followed within two years by the father's bankruptcy, is within that section, and that a son can be compelled to refund all moneys given to him within that period for his maintenance or advancement in life. It seems to me a very strong thing to say that a definition of "property" not to be found in the section itself which deals with this matter, but found in the interpretation clause applying to the whole Act, should have an effect going so much further than the legislature has gone before. I do not think it was intended that s. 47 should have that effect. One must look at the whole of the language of the section in applying that definition, and consider what is meant by "settlement." Although "settlement," by the 3rd sub-

section "shall for the purposes of this section include any conveyance or transfer of property," yet I think the view of my brother Mathew is well founded, and that a settlement in the ordinary sense of the word is intended. The transaction must be in the nature of a settlement, though it may be effected by a conveyance or transfer. The end and purpose of the thing must be a settlement, that is, a disposition of property to be held for the enjoyment of some other person. Thus a purchase by the father of shares, which are registered in the son's name, and upon which the son receives the dividends, is within the statute. But where the gift is of money to be expended at once, the transaction is not, in my opinion, within s. 47 of the Act of 1883. It would not have been within the Act of 1849, and I do not feel bound by reason of the interpretation clause in the Act of 1883, the effect of which is, I think, restricted by the terms of s. 47 itself, to put a construction upon the words of that section which has never been put upon similar words before the Act of 1883 was passed, and which would bring about such serious and far-reaching consequences.

WILLS, J. I am of the same opinion.

Appeal dismissed.

Solicitors for trustee: *Tamplin, Tayler, & Joseph.*

Solicitors for E. O. Player: *Smith & Lawrence, for Smith, Lawrence, & Smith, Swansea.*

W. A.

END OF VOL. XV.

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ARBITRATION — *Action for Tort — Order of Reference — Death of Party before making of Award—Maxim, "Actio personalis moritur cum personâ."*] The parties to an action for a tort agreed before trial to refer the matter in dispute to an arbitrator. The order of reference contained a clause that the arbitrator should publish his award "ready to be delivered to the parties in difference, or such of them as require the same (or their respective personal representatives, if either of the said parties die before the making of the award)." After the hearing of the reference had been concluded, but before the award was made, the plaintiff died. The arbitrator afterwards published the award, and the executors of the plaintiff having proved his will, took up the award:—*Held*, that the cause of action being in tort died with the plaintiff and did not pass to his personal representatives by force of the clause above mentioned, which in an action of tort was inoperative, and that the executors were not entitled to be substituted as plaintiffs in place of their testator. BOWKER *v.* EVANS - C. A. 565

2. —— *Rule of Court—Agreement to appoint Valuers—Landlord and Tenant—Valuation on Expiration of Tenancy—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 17.] An agreement between landlord and tenant for the letting of a farm provided, that the tenant should be paid at the expiration of the tenancy the usual and customary valuation, as between outgoing and incoming tenant, in the same manner as he paid on entering the premises. And it was thereby mutually agreed by and between the parties thereto, that, when any valuation of the covenants should be made between the tenant and the landlord, or his incoming tenant, the persons making such valuation should take into consideration the state, condition, and usage of the farm, and, if not left in a proper and creditable state, should determine what sum of money should be paid to the landlord as compensation therefor, and should deduct such sum from the amount of the valuation. On the expiration of the tenancy, there being no incoming tenant, the landlord and tenant respectively

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appointed a valuer. The valuers could not agree upon the amount of the valuation, and they appointed an umpire, who held a sitting and heard witnesses, and then made and published an award in writing. The tenant, with the view of obtaining an order remitting the matters in dispute to the umpire for reconsideration, applied for an order to make the submission to arbitration contained in the agreement, together with the appointment of arbitrators and umpire, a rule of court, under s. 17 of the Common Law Procedure Act, 1854:—*Held*, that the agreement did not contain any submission to arbitration, but that it provided only for the appointment of valuers, and that it could not, therefore, be made a rule of court.—*In re Hopper* (Law Rep. 2 Q. B. 367) explained and distinguished. In re Dawdy [C. A. 426

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2. —— *Appeal — Preliminary Objection — Notice—Costs.*] The solicitor of a respondent, if he is aware of a preliminary objection to an appeal, ought, as a matter of courtesy, to inform his opponent of it without delay, but the omission to do so is not, if the appeal is dismissed on the preliminary objection, a sufficient reason for depriving the respondent of the costs of the

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appeal.—*In re Speight* (13 Q. B. D. 42), and *Ex parte Blease* (14 Q. B. D. 123) not followed. Ex parte Shead. In re Mundy - C. A. 338

3. —— *Composition Arrangement—Preference of some Creditors—Fraud.*] The essence of a composition arrangement between a debtor and his creditor is equality between the creditors, and consequently a creditor who has executed a composition deed is entitled to repudiate it, if he afterwards discovers that other creditors have been induced to execute the deed by means of a secret bargain for a payment to them in excess of the composition, even if the bargain was made after his own execution of the deed.—This principle applies even if the additional payment is to be made at the expense of a third person, provided that the bargain is made with the debtor's knowledge, and it applies whether the composition arrangement is made under the provisions of a statute or not. Ex parte Milner. In re Milner - - - - - C. A. 605

4. —— *Composition—Secured Creditor—Deposit of Goods—Bill given for Debt indorsed away—Composition paid to Indorsee without deducting Value of Security.*] The plaintiff gave credit to the defendants for goods sold, and made advances to them, goods being deposited by the defendants with the plaintiff as security, and bills being drawn by the plaintiff and accepted by the defendants for the amounts of the goods sold and advances made.—The plaintiff indorsed away such bills for value. During the currency thereof the defendants filed a petition for liquidation by way of arrangement or composition with their creditors under the Bankruptcy Act, 1869. The creditors of the defendants passed resolutions for the acceptance of a composition. The holders of the bills, by arrangement between themselves and the plaintiff, claimed and were paid the composition on the total amounts of the bills, the plaintiff paying them the balance thereof. The plaintiff having realized his security by sale of the goods deposited claimed to hold the proceeds against the balance so paid by him upon the bills:—*Held*, that under the above circumstances the plaintiff could not be considered to have abandoned or forfeited his right to the security, but that the plaintiff was not entitled to stand in a better position than that which he would have occupied if he had not negotiated the bills, in which case he could only have received a composition on the balance of his debt after deducting the value of the security; and that consequently he was bound to account to the defendants for the amount by which the composition paid on the bills exceeded that which would have been paid if the value of the security had been deducted before ascertaining the amount of the composition. Baines *v.* Wright - - 102

5. —— *Composition or Scheme of Arrangement—Approval of Court—Discretion of Registrar—Wishes of Creditors—Evidence of Facts justifying Court in refusing to approve—Report of Official Receiver—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 18, 28.] The report of the official receiver is, under s. 18 of the Bankruptcy Act, 1883 (as it is under s. 28), primâ facie evidence of the statements contained in it.—The registrar, in

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deciding whether he will or will not approve a composition or scheme of arrangement accepted by the creditors of a bankrupt, is exercising a judicial discretion, and the Court of Appeal will not readily set aside his order.—It is the duty of the registrar to form his own judgment, and not to be influenced by the wishes of the creditors. EX PARTE CAMPBELL. IN RE WALLACE C. A. 213

6. —— *Costs—Taxation—Costs of Taxation—Solicitor to Trustee in Bankruptcy*—6 & 7 *Vict. c.* 73, *ss.* 37, 38, 39.] Under an ordinary reference to tax the costs of the solicitor to a trustee in bankruptcy the taxation is regulated by the practice of the Court of Bankruptcy, and the provisions of the Act 6 & 7 Vict. c. 73, have no application.—There is no rule in the Court of Bankruptcy that, if on such a taxation the amount of the solicitor's bill is reduced by more than one-sixth, he is to pay the costs of the taxation. EX PARTE MARSH. IN RE MARSH - C. A. 340

7. —— *County Court—Judgment Summons for Committal—Transfer to Bankruptcy Court—Receiving Order—Notice to Judgment Debtor—Debtors Act*, 1869, *s.* 5—*Bankruptcy Act*, 1883, *s.* 103, *sub-ss.* 4, 5—*Bankruptcy Rules*, 1885, *r.* 268 (1) (*a*).] When a judgment summons for a committal comes before the judge of a county court, not having jurisdiction in bankruptcy, and he, being of opinion that a receiving order should be made in lieu of a committal, makes an order transferring the matter to the Bankruptcy Court, notice of the subsequent proceedings under the order of transfer must be served on the judgment debtor.—In such a case the Court of Bankruptcy is not bound to act on the opinion of the county court judge, and to make a receiving order as of course, but must exercise its judicial discretion on hearing the case on its merits. IN RE ANDREWS. EX PARTE ANDREWS - - - - 335

8. —— *Power of County Court to restrain Proceedings in High Court—Solicitor—Right of Audience—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 100, 102, 151, 168.] Under the Bankruptcy Act, 1883, a county court sitting in bankruptcy has no power to restrain proceedings in an action in the High Court.—Decision of Cave and Wills, JJ., reversed.—There is no absolute rule that a question relating to the estate of a bankrupt ought to be determined by the Court of Bankruptcy, and not by the High Court, whenever the trustee in the bankruptcy is, by virtue of the bankruptcy law, claiming by a higher title than that of the bankrupt himself. It is a matter of judicial discretion in each case how the question shall best be tried.—In such a matter the Court of Appeal ought not readily to overrule the discretion of the bankruptcy judge.—Per Cave and Wills, JJ. A solicitor has a right of audience on an appeal to the Divisional Court from a county court sitting in Bankruptcy. EX PARTE REYNOLDS. IN RE BARNETT - - C. A. 169

9. —— *Execution Creditor—Sale under Execution—Notice to Sheriff of Bankruptcy Petition against or by Debtor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 46 (2), 168.] The notice of a bankruptcy petition mentioned in sub-s. 2 of s. 46 of the Bankruptcy Act, 1883, must be served on the sheriff or his recognised agent (such as the

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under-sheriff), for the purpose of receiving such notices; it is not sufficient to serve it upon an ordinary bailiff or man in possession.—The effect of the provision of s. 168 that "sheriff includes any officer charged with the execution of a writ or other process," is to bring within s. 46 officers of inferior courts who discharge for those courts duties similar to those which the sheriff discharges for the High Court.—On F., the serjeant-at-mace of the Mayor's Court of London, proceeding to execute a warrant issued to enforce a judgment for more than 20*l.* obtained in that court, he found H., an officer of the sheriffs of London, in possession of the goods of the debtor under a writ issued by the Queen's Bench Division, and thereupon, in accordance with the usual practice, he delivered the warrant to H. for execution. H. sold the goods, and out of the proceeds paid the amount of the warrant to F. The next day notice was served on H. of a bankruptcy petition having been presented against the debtor on which he was afterwards adjudged bankrupt. No notice of the petition was served on F.:—*Held*, by Cave, J., that by virtue of s. 168, H. must under the circumstances be deemed to be "the sheriff" for the purposes of s. 46, sub-s. 2; and that therefore the trustee in the bankruptcy was, as against the execution creditor, entitled to the money.—*Held*, by the Court of Appeal, that even if an effectual notice could ever have been served on H., a notice served on him after he had handed over the money to F., and his agency for F. had thus been determined, was ineffectual, and that consequently the execution creditor was entitled to the proceeds of sale. EX PARTE WARREN. IN RE HOLLAND - - - - C. A. 48

10. —— *Gift of Chattels—Bankruptcy of Donor—Costs.*] In 1866 A., soon after the birth of his son T., purchased a pipe of wine for his son, and had it bottled and laid down in his cellar, and from that time it remained intact in the cellar and was known in the family and amongst their friends as T.'s wine. In 1885 A. became bankrupt:—*Held*, that there was not sufficient evidence of an intention to make an immediate present gift of the wine to T., and that it passed to the trustee in bankruptcy. IN RE RIDGWAY. EX PARTE RIDGWAY - - - - 447

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12. —— *Bankruptcy Petition—Dismissal—Adjournment—"Sufficient cause"—Prior Arrangement between Debtor and Creditors—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 7 (3).]

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The fact that a debtor has, shortly before the presentation of a bankruptcy petition against him, entered into an arrangement with his creditors (to which the petitioner has not assented) is not, however beneficial to the creditors the terms of the arrangement may be, a "sufficient cause" within the meaning of s. 7 (3) of the Bankruptcy Act, 1883, for dismissing the petition.—And, there being no jurisdiction under such circumstances to dismiss the petition, there is no jurisdiction to adjourn the hearing of it with a view to its ultimate dismissal in case the arrangement shall be found to work well.—The decision in *Ex parte Dixon* (13 Q. B. D. 118) did not depend upon the particular terms of the arrangement in that case, but on the fact that the arrangement was made at such a time and in such a manner as not to bind the dissentient creditors. EX PARTE ORAM. IN RE WATSON - - **C. A. 399**

13. —— *Petition—Money paid by Debtor to his Solicitor to oppose Petition—Adjudication—Title of Trustee.*] Money bonâ fide paid by a debtor to his solicitor to defray counsel's fees and other legal expenses in opposing proceedings in bankruptcy that have been commenced against him, cannot, should adjudication follow, be recovered from the solicitor by the trustee in bankruptcy, even although the solicitor knew of the acts of bankruptcy on which the proceedings were based. IN RE SINCLAIR. EX PARTE PAYNE **616**

14. —— *Practice—Affidavit sworn Abroad—British Vice-consul—Notarial Certificate*—18 & 19 *Vict. c.* 42, *ss.* 1, 2, 3—*Bankruptcy Act*, 1883, *s.* 135—*Schedule I., r.* 14—*Bankruptcy Rules*, 1883, *r.* 50.] When an affidavit or proof in bankruptcy is sworn abroad before a British consul, or vice-consul, a notarial certificate in verification of the signature and qualification of the consul, or vice-consul, is not required.—The notarial certificate is only required when such an affidavit or proof is sworn before a foreign functionary. IN RE MAGEE. EX PARTE MAGEE - - - - **332**

15. —— *Proof—"Debt or Liability"—Order of Divorce Court for Payment of monthly or weekly Alimony*—29 & 30 *Vict. c.* 32, *s.* 1—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 37—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.] Future weekly or monthly payments of alimony, payable by a husband by virtue of an order of the Divorce Court made under s. 1 of the Act 29 & 30 Vict. c. 32, are not capable of valuation, and are not a "debt or liability" within the meaning of s. 37 of the Bankruptcy Act, 1883. They cannot, therefore, be proved in the bankruptcy of the husband, and he is, notwithstanding his bankruptcy, liable to continue the payments.—Arrears of payments of alimony under such an order constitute a debt enforceable under s. 5 of the Debtors Act, 1869.—Decision of Cave, J., affirmed. LINTON *v.* LINTON - - - - - **C. A. 239**

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it be not of a perishable nature.—Decision of Cave, J. (14 Q. B. D. 407), reversed. EX PARTE BOARD OF TRADE. IN RE PARKER - **C. A. 196**

17. —— *Reputed Ownership—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.] J., who carried on business as a stockbroker, silversmith, and watchmaker, deposited with his bankers the certificates of thirty shares in a joint stock company as security for the balance of his overdrawn account. There was no formal transfer of the shares. The company had notice of the deposit on the 31st of January, 1884. On the 2nd of February a petition in bankruptcy was filed against J., and a receiving order made, and he was subsequently adjudged bankrupt:—*Held*, that the shares were not at the commencement of the bankruptcy "in the possession, order, or disposition of the bankrupt *in his trade or business*," within s. 44 of the Bankruptcy Act, 1883. *In re* JENKINSON. *Ex parte* NOTTINGHAM AND NOTTINGHAMSHIRE BANK - - - - **441**

18. —— *Solicitor—Right of Audience—Examination of a Debtor by a Solicitor—Solicitor to be authorised in Writing—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 17, *sub-s.* 4.] The Bankruptcy Act, 1883, s. 17, sub-s. 4, enacts with reference to the public examination of a debtor under that Act, "that any creditor who has tendered a proof, or his representative authorised in writing, may question the debtor concerning his affairs, and the causes of his failure":—*Held*, that a solicitor who appears at a bankruptcy court for a creditor who has tendered a proof, is the creditor's representative within the meaning of that sub-section, and is therefore not entitled so to question the debtor without being authorised in writing and producing his authority if required by the Court to do so.—*Query*, if such solicitor, when his right of audience has been so denied to him, is "a party," within the meaning of s. 43 of the County Courts Act, 1856 (19 & 20 Vict. c. 108), who is entitled to apply to the superior Court for a rule to compel the county court judge to give him audience. THE QUEEN *v.* REGISTRAR OF THE GREENWICH COUNTY COURT - - **C. A. 54**

19. —— *Stoppage in Transitu—End of Transit—Destination—Goods bought by Commission Agent in England for Foreign Principal—Bankruptcy of Agent.*] A commission agent in London was employed by merchants at Kingston, Jamaica, to buy goods for them in England. He ordered the goods of the manufacturers "for this mark," there being in the margin of the letter which gave the order a mark consisting of two letters, with "Kingston, Jamaica," added. The manufacturers knew from previous dealings that this mark had been used by the Jamaica firm. The goods were to be paid for by six months bills drawn by the manufacturers on the commission agent and accepted by him. On the 11th of September the commission agent wrote to the manufacturers, telling them to pack the goods and mark them with the mark previously mentioned, and to forward them to specified shipping agents at Southampton, for shipment by a particular ship, "advising them with particulars for clearance." On the 13th of September, the manufacturers sent the invoice of the goods to

BANKRUPTCY—*continued.*

the commission agent, telling him that they had that day forwarded the goods by railway to the shipping agents "with the usual particulars for clearance." The same day the manufacturers wrote to the shipping agents, sending them the particulars of the goods, and adding, "which please forward as directed." The particulars described the goods as marked with the letters originally given by the commission agent, and the words "Kingston Jamaica," and numbered with specified numbers, but the columns for "consignee" and "destination" were left in blank. The cost of the carriage to Southampton was paid by the manufacturers. On the 14th of September the commission agent sent to the shipping agents particulars of the goods, giving the name of the Jamaica firm as consignees, and stating the destination of the goods to be Kingston, Jamaica. The goods were shipped on board the vessel, the bills of lading describing the commission agent as consignor, and the Jamaica firm as consignees. After the ship had sailed, but before her arrival at Jamaica, the commission agent stopped payment, and the manufacturers, who had not been paid for the goods, gave notice to the shipowners to stop them in transitu:—*Held*, that, as between the commission agent and the manufacturers, the transit was at an end when the goods arrived at Southampton, and that the notice to stop was given too late.—*Ex parte Watson* (5 Ch. D. 35), distinguished. *Ex parte* MILES. *In re* ISAACS [C. A. 39

20. —— *Voluntary Settlement—Gift of Money to Son—"Settlement of Property"*—46 & 47 *Vict. c.* 52, *s.* 47.] A gift of money to a son, made for the purpose of enabling him to commence carrying on business on his own account, is not a "settlement of property," within the meaning of sect. 47 of the Bankruptcy Act, 1883, which renders such settlements void in certain specified cases as against the trustees in the bankruptcy of the settlor. *In re* PLAYER. *Ex parte* HARVEY 682

—— Notice — Final judgment — Judgment for costs - - - - 627
See BANKRUPTCY.

BETTING—Agent betting for principal—Action for the money received - - 363
See PRINCIPAL AND AGENT.

BILL OF EXCHANGE—Bankruptcy—Composition—Payment to indorsee without deducting value of security - - 102
See BANKRUPTCY. 4.

BILL OF LADING—Incorporation of conditions in charter party - - - 154
See SHIP.

BILL OF SALE—*After-acquired Property—Subsequent Bill of Sale—Grant of Legal Interest—Seizure by Owner of Equitable Interest.*] By a bill of sale executed in 1875, R. granted to M. the after-acquired chattels which should be upon certain premises of R. The title of M. under the bill of sale ultimately vested in the defendant. R. brought upon the premises chattels acquired by him after 1875, and before the coming into operation of the Bills of Sale Act, 1882, by a bill of sale granted to the plaintiff these after-acquired chattels. The plaintiff had no notice of the bill

BILL OF SALE—*continued.*

of sale in favour of M. In January, 1884, the defendant seized the after-acquired chattels then upon the premises of R. The plaintiff demanded possession of them from the defendant, who refused to give them up; and the plaintiff thereupon brought an action to recover their value:—*Held*, that the plaintiff was entitled to recover from the defendant the value of the goods in question; for the grant of the after-acquired chattels to M. carried only an equitable interest, while the plaintiff by the grant to him took the legal interest without notice of the prior equitable interest vested in M. and had a better title than the defendant.—*Joseph* v *Lyons* (10 Q. B. D. 280) followed. HALLAS *v.* ROBINSON - C. A. 288

2. —— *Assignment of future-acquired Chattels — Prior Equitable Estate — Subsequent Legal Estate without Notice—Supreme Court of Judicature Acts*, 1873, 1875 (36 & 37 *Vict. c.* 66; 38 & 39 *Vict. c.* 77.] The Supreme Court of Judicature Acts, 1873, 1875, have not abolished the distinction between legal and equitable interests, they merely enable the High Court to administer legal and equitable remedies; and therefore notwithstanding these statutes, the grant of future-acquired chattels confers only an equitable interest upon the grantee; and if when they come into existence, but before the grantee takes possession thereof, the legal estate and interest therein, without notice of the grantee's existing equitable interest, become vested in another person, the latter is entitled to the future-acquired chattels comprised in the grant, and becomes the owner thereof, both at law and in equity.—By a bill of sale a jeweller, for a valuable consideration, assigned to the plaintiff his after-acquired stock-in-trade subject to a proviso for redemption: before the plaintiff took possession of the after-acquired stock-in-trade, the jeweller pledged a portion of it with the defendant, who had no notice of the plaintiff's bill of sale:—*Held*, that the defendant was entitled to retain the stock-in-trade pledged with him as against the plaintiff, and that no action of detinue or conversion would lie. JOSEPH *v.* LYONS C. A. 280

3. —— *Stipulated Time for Payment—Seven Days after Demand—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9, *and Schedule.*] A bill of sale was given by way of indemnity to the grantee on his becoming security for the payment by the grantor of a sum of money, being an instalment of a composition due by him to his creditors. The grantor agreed that he would pay the said sum of money to his creditors on a given day, and the bill of sale provided that if he did not pay the money on the day named, and the grantee should be obliged to pay the same, the grantor would repay to the grantee the amount within seven days after demand in writing, with power in default to the grantee to seize and sell the goods:—*Held* (on the authority of *Hetherington* v. *Groome* (13 Q. B. D. 789)), that the bill of sale did not contain an agreement to pay the money secured at a stipulated time in accordance with the form given in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, and was therefore void. SIBLEY *v.* HIGGS. TAPLIN, CLAIMANT - 619

BREAD, SALE OF—*Delivery by Cart without Beam and Scales—Delivery to oblige Customer*—6 & 7 *Wm.* 4, *c.* 37, *s.* 7.] Sect. 7 of 6 & 7 Wm. 4, c. 37, provides that every baker or seller of bread, and every servant employed by such baker or seller of bread, who shall convey or carry out bread for sale in and from any cart, shall be provided with a beam and scales with proper weights, in order that all bread sold by any such baker or seller of bread, or his servant, may be weighed in the presence of the purchaser thereof; and in case any "such baker or seller of bread" or his servant shall carry out or deliver any bread without being provided with such beam and scales, every such baker or seller of bread shall be liable to a penalty.—A customer bought three loaves in a baker's shop. The baker weighed the loaves in her presence, and subsequently, at her request and to oblige her, his servant carried them out in a cart and delivered them at her house, without being provided with any beam and scales:—*Held*, that the baker had not carried out or delivered the loaves as "such baker or seller of bread," and therefore could not be convicted of an offence under s. 7. Daniel *v.* Whitfield - 408

BY-LAW—School Board—Non-payment of fees
See Elementary Education. [415

CARRIER—*Delivery to Consignee—Non-payment of Freight by Consignee—Liability of Consignor.*] The defendants hired a trolly, and agreed with the owner to pay for the carriage both ways. The defendants delivered the trolly to the plaintiffs, to be returned to the owner under a consignment note which stated that the defendants requested the plaintiffs to receive and forward the trolly as per address and particulars on the note, and on the conditions stated therein. The note gave the name of the owner as consignee, and in a column headed "who pays carriage" was inserted "consignee." The plaintiffs delivered the goods to the consignee, who declined to pay the freight on the ground that the defendants had agreed to pay it. In an action to recover the freight from the defendants:—*Held*, that under the circumstances the defendants could not be treated merely as agents of the consignee to make the contract for the carriage of the trolly, but were themselves contracting parties, and liable to pay the freight. Great Western Railway Company *v.* Bagge - - - - 625

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COMPANY — Certificates of shares — Reputed ownership—Bankruptcy - - 441
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CONCEALMENT—Material fact — Arrangement by assured to employ particular lighterman - - - - - 368
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CONSIGNOR AND CONSIGNEE—Carriage of goods—Non-payment of freight by consignor—Liability of consignee - 625
See CARRIER.

CONSPIRACY — *Combination or Conspiracy to effect an unlawful Object—Interim or Interlocutory Injunction—Irreparable Damage.*] A confederation or conspiracy by an associated body of shipowners which is calculated to have and has the effect of driving the ships of other merchants or owners, and those of the plaintiffs in particular, out of a certain line of trade,—even though the immediate and avowed object be, not to injure the plaintiffs, but to secure to the conspirators themselves a monopoly of the carrying trade between certain foreign ports and this country,—is, or may be, an indictable offence, and therefore actionable, if private and particular damage can be shewn.—To warrant the Court, however, in granting an interim or interlocutory injunction to restrain the parties from continuing to pursue the objectionable course, those who complain must at least shew that they have sustained or will sustain "irreparable damage,"—that is, damage for which they cannot obtain adequate compensation without the special interference of the Court. MOGUL STEAMSHIP COMPANY *v.* M'GREGOR, GOW, & CO. 476

CONTEMPT—Solicitor—Unqualified practitioner—Attachment - - - 348
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CONTRACT—Illegality—Bail in criminal case—Action to recover deposit - - 561
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CONTRIBUTION—Tenancy in common of house—Money spent by one tenant in common for repairs - - - - 60
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COSTS—Bankruptcy—Appeal — Preliminary objection—Notice - - - 338
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—— Bankruptcy—Taxation—Solicitor to trustee—6 & 7 Vict. c. 73, ss. 37, 38, 39 340
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—— Order on solicitor to pay costs personally—Appeal - - - - 635
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—— Security for—Counter-claim—Defendant out of jurisdiction - - - 423
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—— Taxation—Solicitor and client—Costs of third counsel - - - 252
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COUNSEL—Costs of third counsel—Taxation—Solicitor and client - - 252
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COUNTER-CLAIM—Security for costs—Defendant out of jurisdiction - - 423
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COUNTY—Highway — Disturnpiked road—Contribution for repair - - - 25
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COUNTY COURT—Bankruptcy—Power to restrain proceedings in High Court - - 169
See BANKRUPTCY. 8.

COVENANT, RESTRICTIVE—Non-disclosure to purchaser—Right to rescind - - 261
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CRIMINAL LAW—*Larceny by a Bailee—24 & 25 Vict. c. 96, s. 3—Infant, Bailment to.*] An infant over fourteen years of age fraudulently converted to his own use goods which had been delivered to him by the owner under an agreement for the hire of the same:—*Held*, that he was rightly convicted of larceny as a bailee of the goods under 24 & 25 Vict. c. 96, s. 3. THE QUEEN *v.* MCDONALD [C. C. R. 323

—— Bail—Indemnity of surety—Action to recover deposit - - - 561
See ILLEGALITY.

DAMAGES — *Measure of Damages — Breach of Contract—Sale of Goods to fulfil a Contract by Vendee.*] The defendants contracted with the plaintiff to deliver goods to him of a particular shape and description at certain prices and by instalments at different times. When the contract was made the defendants knew that, except as to price, it corresponded with and was substantially the same as a contract which the plaintiff had entered into with a French customer of his, and that it was made in order to enable the plaintiff to fulfil such last-mentioned contract. The defendants broke their contract, and there being no market for goods of the description contracted for, the plaintiff's customer recovered damages against him in the French court to the amount of 28*l.*:—*Held*, in an action against the defendants for their breach of contract, that the plaintiff was not only entitled to recover as damages the amount of profit he would have made had he been able to fulfil his contract with his customer, but also damages in respect of his liability to such customer, and that in estimating such last-mentioned damages the 28*l.* which the French Court had given might be treated as not an unreasonable one at which such damages might be assessed.—The case of *Elbinger Actien-Gesellschafft* v. *Armstrong* (Law Rep. 9 Q. B. 473) approved of. GRÉBERT-BORGNIS *v.* NUGENT - - - C. A. 85

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DIVORCE—Order for payment of alimony—Bankruptcy—Proof - - - 239
See BANKRUPTCY. 15.

EASEMENT—*Prescription Act*, 2 & 3 *Wm.* 4, *c.* 71, *s.* 8—*Right of Way—Forty Years' Enjoyment—Remainderman—"Reversion expectant" on Term of Life or Years.*] Where a right of way is claimed by virtue of forty years' enjoyment under the Prescription Act, 2 & 3 Wm. 4, c. 71; the period during which the servient tenement has been vested in a tenant for life, with remainder in fee, cannot be deducted from the period of forty years' enjoyment—for the remainderman is not "a person entitled to the reversion expectant on a term" within s. 8. SYMONS *v.* LEAKER 629

ECCLESIASTICAL LAW—*Dilapidations—Sequestration of Benefice—Dilapidations of Glebe Buildings—Repairs done by Sequestrator—Ecclesiastical Dilapidations Act*, 1871 (34 & 35 *Vict. c.* 43), *ss.* 12–16, 72—*Accounts of Sequestrator, Objection to.*] A benefice having been sequestrated under a writ of sequestration in an action, an inspection of the glebe buildings by the diocesan surveyor was directed by the bishop, and a report made by such surveyor under the Ecclesiastical Dilapidations Act, 1871. The report estimated the cost of the necessary repairs to the buildings at 140*l.*, and no objections were taken to such report under s. 16 of the Act. The sequestrator, being subsequently of opinion that the repairs provided for by the surveyor's report were inadequate, expended on the repairs of the buildings a much larger sum than 140*l.* No inspection or report, except as before mentioned, was ordered by the bishop or made by the surveyor:—*Held*, that the sequestrator had no authority to expend on repairs out of the proceeds of the benefice a larger sum than that estimated as necessary by the surveyor's report under the Ecclesiastical Dilapidations Act, 1871, and that such expenditure must be disallowed. KIMBER *v.* PARAVICINI - - - 222

2. —— *Quare Impedit—Consolidated Benefice under* 3 & 4 *Vict. c.* 113, *and* 26 & 27 *Vict. c.* 120—*Right of Presentation.*] The vicarage of P. formerly consisted of two medieties, known respectively as the upper vicarage and the lower vicarage, the profits and spiritual charge being divided between two incumbents. There was only one parish church, and the right of patronage and nomination to the upper vicarage was vested in the Lord Chancellor, and that of the lower in the Rev. H. F. Welch. In 1873, Welch presented himself to the lower vicarage. In 1875, he mortgaged the advowson thereof (with a power of sale) to Howes for 800*l.*, and in 1877 made a further charge upon it in favour of Howes of 250*l.*—In 1878, the Lord Chancellor, under 26 & 27 Vict. c. 120, conveyed to Welch the advowson of the upper vicarage, subject to the then-existing incumbency. There was a proviso in the Act restricting the purchaser from selling the advowson or next presentation until after the expiration of five years from the date of the purchase. In May, 1879, the incumbency of the lower vicarage having become vacant, the two vicarages were under 3 & 4 Vict. c. 113 and an Order in Council consolidated, and the two medieties became in respect both of the profits and the spiritual charge one undivided benefice, of which Welch without any form of institution became the incumbent, in whom was vested the advowson or right of patronage and nomination of the whole undivided benefice. On the 1st of August, 1879, Welch mortgaged the advowson of the consolidated benefice to Howes, to secure the previous and further advances, with the usual power of sale.—In March, 1882, Howes died, leaving a widow, and having by his will devised and bequeathed his residuary real and personal estate to trustees, in trust for his wife for life, &c. In March, 1883, the executors of Howes contracted to sell the advowson of the undivided benefice to his widow, and she, in April, 1883, contracted to sell the same to one Ellison. In June, 1883, Welch died insolvent (the debt to Howes still remaining unpaid), having by his will devised and bequeathed all his real and personal estate to trustees in trust for his widow (the now plaintiff) for life, &c.—The plaintiff and the executors of Howes each claimed the right to present to the undivided vicarage:—*Held*,—upon the authority of *Hawkins* v. *Chappel* (1 Atk. 621) and *Briggs* v. *Sharp* (Law Rep. 20 Eq, 317),—that the right to nominate was in the plaintiff, she being under her husband's will beneficial owner for life of his estate real and personal, and there being no indication of an intention that during her life the right to nominate should be exercised by any other person. WELCH *v.* BISHOP OF PETERBOROUGH [432

EJECTMENT—*Landlord and Tenant—Holding over after Expiration of Term—Writ of Possession when Plaintiff's Title has expired.*] Where a landlord has recovered judgment in an action against his tenant for the possession of premises which had been held over after the expiration of the tenancy, he will be allowed to issue the writ of possession notwithstanding that his estate in the premises terminated after the commencement of the action and before the trial, unless it be unjust and futile to issue such writ, and it is for the defendant to shew affirmatively that this will be the result of issuing such writ. KNIGHT *v.* CLARKE [C. A. 294

ELECTION—Municipal—Nomination paper—Signature of assenting burgess—Burgess roll—Variance - - - 273
See MUNICIPAL CORPORATION.

ELEMENTARY EDUCATION—*Board Schools—Non-payment of Fees for Tuition—Causing Child to attend School, what is—By-law—Penalty—Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *s.* 74.] The London School Board made by-laws, under s. 74 of the Elementary Education Act, 1870, providing that the parent of every child, if not less than five nor more than thirteen years of

ELEMENTARY EDUCATION—*continued.*
age, should cause such child to attend school unless there was a reasonable cause for non-attendance, and that every parent who should not observe or neglect any by-law should be liable upon conviction to a penalty.—The respondent sent his child, aged ten, to one of the Board's schools, but did not pay, though he was able to pay, the weekly fees for tuition prescribed by the School Board with the consent of the Education Department. The child was admitted to the school, and received instruction therein:—*Held*, that the respondent had not caused his child to attend school within the meaning of the by-laws, and therefore was liable to the penalty. LONDON SCHOOL BOARD *v.* WOOD - - - 415

ENTRY, RIGHT OF—*Title to Land*—"*Pretenced*"—*Buying of*—*Forfeiture*—32 *Hen.* 8, *c.* 9, *s.* 2; 8 & 9 *Vict. c.* 106, *s.* 6—*Knowledge of Buyer.*] In an action for a forfeiture under 32 Hen. 8, c. 9, s. 2, against the buyer of a right of entry, since 8 & 9 Vict. c. 106, s. 6, the onus is upon the plaintiff to prove not only that the title purchased was bad, but also that the buyer knew that it was "pretenced," i.e. fictitious, or bad in fact. The mere fact that the right purchased was barred by the Statute of Limitations at the time of the purchase does not necessarily render the title "pretenced" within the meaning of the 32 Hen. 8, c. 9. KENNEDY *v.* LYELL - - - 491

ESTOPPEL—*Injunction*—*Res Judicata*—*Second Action for same Cause of Action*—*Prayer for "further or other Relief"*—*Chancery Amendment Act*, 1858 (21 & 22 *Vict. c.* 27), *s.* 2—*Judicature Act*, 1873, *s.* 24, *sub-s.* 7.] In March, 1881, the plaintiff handed to one Bird, a broker, shares in a mining company, with a transfer signed (a blank being left for the name of the transferee), for the purpose of sale. Bird died; and it was then discovered that he had, without the knowledge or authority of the plaintiff, lodged the shares with the defendant's firm as security for an advance. Having received notice from the company that they were about to register the shares in the name of the defendant, the plaintiff commenced an action in the Chancery Division of the High Court to restrain the defendant's firm and the company from parting with the shares or registering the defendant as transferee,—concluding with the usual prayer for "such further or other relief as the nature of the case might require."—On the 23rd of February, 1882, the defendants in that action consented to an order for the delivery up of the shares to the plaintiff forthwith. The order directed that, "upon delivery of the deed or form of transfer and the securities representing the same, and upon payment of costs to the plaintiff and the mining company, all proceedings in the said Chancery action should be stayed."—The shares were not delivered up to the plaintiff until the 28th of April, 1882, when they were sold at a considerable loss.—In an action against the defendant in the Queen's Bench Division to recover damages for this detention, the jury found that the plaintiff did not authorize Bird to pledge the shares for his own debt, or lend them to him for that purpose:—*Held*, that the plaintiff was estopped by the consent order made in the Chancery

ESTOPPEL—*continued.*
action on the 23rd of February, 1882, from recovering in this action damages for such detention, and that the defendant was not responsible for the detention of the shares by the mining company after the order had been made in the suit in the Chancery Division. SERRAO *v.* NOEL [C. A. 549

EVIDENCE—Bankruptcy—Administration of estate of person dying insolvent—Power to summon person to be examined 159
See BANKRUPTCY.

EXECUTION—Notice to sheriff of bankruptcy petition against debtor - - 48
See BANKRUPTCY. 9.

EXECUTOR—Order of reference—Death of party before making of award - - 565
See ARBITRATION.

FIXTURES—*Mortgage*—*Lease by Mortgagor after Mortgage*—*Rights of Tenant.*] A mortgagor in possession of premises let them to a tenant who brought on to them certain trade fixtures. The mortgagee subsequently entered and sold the premises under the power of sale contained in the mortgage:—*Held*, that the fixtures did not pass under the mortgage, but remained the property of the tenant. SANDERS *v.* DAVIS - - 218

2. —— *Mortgagor and Mortgagee*—*Driving-belts*—*Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36).] A wheel-factory, including the machinery and gear, was mortgaged to the plaintiffs. The deed of mortgage was not registered as a bill of sale. Leathern driving-belts were used in working the machinery at the factory; they were fastened to certain wheels or drums, but could be removed at pleasure when the machinery was thrown out of gear. They were necessary parts of the machinery. The mortgagor having liquidated his affairs under the Bankruptcy Act, 1869, the defendant, his trustee, sold the belts:—*Held*, that the belts passed to the plaintiffs under the mortgage, and that they were entitled to maintain an action of conversion against the defendant.—*Longbottom* v. *Berry* (Law Rep. 5 Q. B. 123) approved. SHEFFIELD AND SOUTH YORKSHIRE PERMANENT BUILDING SOCIETY *v.* HARRISON C. A. 358

FORFEITURE—Sale of right of entry—Fictitious title—Knowledge of buyer - 491
See ENTRY, RIGHT OF.

FRAUD—Composition with creditors—Undue preference - - - - 605
See BANKRUPTCY. 2.

FRAUDS, STATUTE OF, s. 17—*Sale of Goods*—*Acceptance*—*Act recognising the Contract.*] It is not necessary in order to satisfy the requirements of the 17th section of the Statute of Frauds that there should be an absolute acceptance of goods: there is sufficient evidence of an acceptance of goods within the section where upon delivery of the goods the purchaser has received them and done any act in relation thereto recognising the existence of a contract for the purchase of them by him, though he subsequently refuses the goods. So, where there was a sale of wheat by sample, and the purchaser, having received a number of sacks of wheat delivered under the contract into his premises, opened the sacks and examined

FRAUDS, STATUTE OF—*continued.*
their contents to see if they were equal to sample, but immediately after so doing gave notice to the seller that he refused the wheat as not being equal to sample:—*Held*, that there was evidence of an acceptance.—*Kibble* v. *Gough* (38 L. T. (N.S.) 204) followed.—*Rickard* v. *Moore* (38 L. T. (N.S.) 841) discussed. Page *v.* Morgan [C. A. 228

GAME—*Reservation of Right of Shooting—Overstocking Land with Game—Injury to Crops—Right of Action.*] Where land is let to a tenant reserving the right of shooting over the land, the tenant may maintain an action against the persons entitled to the right of shooting for overstocking the land with game so as to cause damage to the tenant's crops. Farrer *v.* Nelson [258

GAS COMPANY—*Highway—Repair of Streets—Use of Steam Rollers—Statutable Rights—Injury to Property in the exercise of such Rights.*] The plaintiffs, a gas company, laid down pipes under the surface of certain streets, as they were bound by statute to do, for the purpose of supplying gas to light the streets and houses in the streets. The streets were vested in the defendants, the vestry of the parish, by certain statutes which gave them the authority of the surveyor of highways, and with the duty to repair, but without prescribing any particular mode of repair. The defendants used steam-rollers for the repair of the streets, as being a mode of repair most advantageous to both the ratepayers and the public, but the rollers they used were so heavy as to frequently injure the plaintiffs' pipes, though the pipes were sufficiently below the surface as not to have been injured by the ordinary mode of repair if such rollers had not been used:—*Held*, that the plaintiffs were entitled not only to recover damages for the injury which had been done, but also to have an injunction to restrain the defendants from using steam rollers in such a way as to injure the pipes of the plaintiffs. Gas Light and Coke Company *v.* Vestry of St. Mary Abbotts, Kensington - - - - C. A. 1

GIFT—Chattels—Parent and child - 447
See Bankruptcy. 10.

—— Money—Father to son—Voluntary settlement—Bankruptcy - - 682
See Bankruptcy. 20.

GUARDIAN—Parish or union—Disqualification—Salary from poor-rates—Clerk of school board—Clerk of highway board - 382
See Poor-rate. 3.

HABEAS CORPUS—*Prisoner—Party to Motion.*] The Court cannot grant a habeas corpus to a party to a suit, in custody, to enable him to appear in Court merely for the purpose of arguing his case in person.—*Benns* v. *Mosley* (2 C. B. (N.S.) 116) followed. Weldon *v.* Neal - 471

HIGHWAY—*Highway in Borough—Expenses of Maintenance—Contribution from County Authority—Highway Act*, 1862 (25 & 26 *Vict.* c. 61), *s.* 2—*Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict.* c. 77), *ss.* 13, 38.] By the Highway Act, 1862 (25 & 26 Vict. c. 61), s. 2, defining the word "county," "for the purposes of this Act all liberties and franchises except boroughs . . . . shall be considered as forming part of that county by which they are surrounded." By the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 38, "in this Act 'county' has the same meaning as it has in the Highway Acts, 1862 and 1864," and by s. 13 any road which has between the 31st of December, 1870, and the date of the Act ceased to be a turnpike road . . . . shall be deemed to be a main road, and one half of the expenses incurred in the maintenance shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area "by the county authority of the county in which such road is situate" out of the county rate.—A road in the borough and highway area of Over Darwen, in Lancashire, ceased to be a turnpike road in 1877:—*Held*, that, although for the purposes of the Highway Act, 1862, boroughs are not to be considered as forming parts of counties, yet as the road was within the geographical limits of Lancashire, the county of Lancaster was the "county in which such road is situate" within 41 & 42 Vict. c. 77, s. 13, and the county authority was liable to pay half the expenses incurred in the maintenance of such road.—Judgment of the Queen's Bench Division (13 Q. B. D. 497) affirmed. Mayor, &c. of Over Darwen *v.* Justices of Lancaster - C. A. 20

2. —— *Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict.* c. 77), *s.* 13—*Disturnpiked Road*—18 & 19 *Vict.* c. c.—*Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict.* c. 34), *ss.* 47, 49, 50, 51—*Expiration of Turnpike Trusts in* 1877—*Cesser of Turnpike Road—Main Road—Contribution from County for Repair.*] By a local Act (18 & 19 Vict. c. c.) passed in 1855, and incorporating the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), the maintenance of all highways within a district, including a turnpike road, became vested in commissioners. The trustees of the turnpike road thereupon ceased to repair it within the limits of the district. The turnpike trust expired in 1877. The commissioners were the "highway authority" for the district, which was a "highway area" within the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 13:—*Held*, that, notwithstanding the special legislation in 1855 providing for the maintenance of part of the road by the commissioners, it only "ceased to be a turnpike road" within the meaning of s. 13 of the Highways and Locomotives (Amendment) Act, 1878, on the expiration of the turnpike trust between 1870 and the date of passing that Act, and therefore should be "deemed to be a main road," and one half of the expenses of the maintenance of the part within the highway area should be paid to the highway authority by the county authority under s. 13.—Judgment of the Queen's Bench Division (13 Q. B. D. 623) affirmed. Improvement Commissioners of Newton in Makerfield *v.* Justices of Lancaster C. A. 25

3. —— *Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict.* c. 77), *s.* 16—*Main Road, Application for Provisional Order to declare*

HIGHWAY—*continued.*

Ordinary Highway—Road disturnpiked between the 31st of December, 1870, and the passing of the Act.] The 16th section of the Highways and Locomotives Amendment Act, 1878, provides as follows: "If it appears to a county authority that any road within their county which, within the period between the 31st of December, 1870, and the date of the passing of this Act, ceased to be a turnpike road, ought not to become a main road in pursuance of this Act, such authority shall, before the 1st of February, 1879, make an application to the Local Government Board for a provisional order declaring that such road ought not to become a main road." The section further provides that, "Subject as aforesaid, where it appears to a county authority that any road within their county, which has become a main road in pursuance of this Act, ought to cease to be a main road and become an ordinary highway, such authority may apply to the Local Government Board for a provisional order declaring that such road has ceased to be a main road and become an ordinary highway":—*Held*, that a road which had ceased to be a turnpike road within the period specified by the first of the above-mentioned provisions, and had become a main road, there being no application for a provisional order before the 1st of February, 1879, was not excluded from the operation of the second of the above-mentioned provisions, and that the Local Government Board had, therefore, jurisdiction to make a provisional order declaring such road an ordinary highway upon an application made subsequently to the 1st of February, 1879. THE QUEEN *v.* LOCAL GOVERNMENT BOARD - - - - C. A. 70

—— Clerk of highway board—Disqualification as guardian of parish or union - - 382
See POOR-RATE. 3.

—— Repair of street—Use of steam rollers 1
See GAS COMPANY.

HUSBAND AND WIFE—*Married Woman—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 4—*Construction not retrospective—Contract made by Married Woman before the Act not binding on after-acquired Separate Property.*] Sub-s. 4 of s. 1 of the Married Women's Property Act, 1882, is not retrospective, and, therefore, in an action on a contract made by a married woman before the passing of that Act, judgment cannot be ordered in such terms as to be available against separate property to which the defendant became entitled after the date of the contract. TURNBULL *v.* FORMAN C. A. 234

—— Married woman—Limitations—Discoverture—21 Jac. 1, c. 16, ss. 3, 7 - - 667
See LUNATIC. 2.

ILLEGALITY—*Contract—Bail in Criminal Case—Indemnity of Surety—Deposit of Money with Surety—Action to recover Money deposited.*] A contract is illegal, whereby a defendant in a criminal case, who has been ordered to find bail for his good behaviour during a specified period, deposits money with his surety upon the terms that the money is to be retained by the surety during the specified period for his own protection against the defendant's default, and at the expiration of that period is to be returned; and no

ILLEGALITY—*continued.*

action by the defendant in the criminal case will lie to recover back the money deposited with the surety either before or after the expiration of the specified period, although the defendant in the criminal case has not committed any default, and although the surety has not been compelled to pay the amount for which he has become bound.—*Wilson* v. *Strugnell* (7 Q. B. D. 548) as to this point overruled. HERMAN *v.* JEUCHNER C. A. 561

INFANT—Bailment to—Larceny - - 323
See CRIMINAL LAW.

INJUNCTION—Conspiracy by shipowners to exclude ships of other owners from business—Irreparable damage - - 476
See CONSPIRACY.

INSURANCE (MARINE)—*Craft Risk—Arrangement by Assured to employ a particular Lighterman — Concealment of a Material Fact.*] On policies of marine insurance on goods, which included risks on crafts and lighters, underwriters to the knowledge of the plaintiffs charged a higher rate of premium where the insurance was with no recourse against lightermen (which meant where the lighterage was done on the terms that the liability of the lightermen was to be less than that of common carriers, namely, for negligence only), than they charged where there was such recourse and the liability of the lightermen was to be that of common carriers. The plaintiffs effected with the defendant, a Lloyd's underwriter, a policy of marine insurance on goods which included risk on craft and lighters, and was not with no recourse against lightermen. At the time of effecting such policy the plaintiffs had an arrangement with one H., by which he was to do all the plaintiffs' lighterage on the terms that he was only to be liable for negligence:—*Held*, that if the plaintiffs intended that the goods so insured should be landed under such arrangement with H., it was a fact which a prudent and experienced underwriter would take into consideration in estimating the premium, and that therefore a jury would be justified in finding that the non-communication of it to the defendant was the concealment of a material fact which vitiated the policy.—A mere disclosure of the existence of such arrangement to the defendant's solicitor is not notice of it to the defendant. TATE *v.* HYSLOP - - - - C. A. 368

2. —— *Re-insurance—Constructive Total Loss—Notice of Abandonment—Suing and Labouring Clause.*] Upon a constructive total loss happening to the ship insured, notice of abandonment need not be given to the underwriters of a policy of re-insurance.—The owners of a ship insured her for twelve months in an ordinary Lloyd's policy, which contained a suing and labouring clause. The underwriters of the Lloyd's policy re-insured themselves with a French company which re-insured itself with the defendants. The policy underwritten for the French company by the defendants was for 1000*l.*, bound them to pay as might be paid on the original policy, was to cover the risk of total loss only, and contained a suing and labouring clause. Whilst the policy was in force, the ship went ashore and was much damaged. Her owners gave notice of abandon-

INSURANCE (MARINE)—*continued.*
ment to the underwriters of the Lloyd's policy, but notice of abandonment was not given to the defendants: the underwriters of the ship ultimately settled with her owners at 88 per cent. They expended more than 5000*l.* in floating the ship, and sold her to a builder, who repaired her at a cost of 9000*l.*, and resold her for 11,200*l.* The cost of floating the ship (after deducting the price paid by the shipbuilders) being added to the 88 per cent. represented a loss of 112 per cent. In an action by the French company as re-insurers against the defendants:—*Held*, that a constructive total loss had occurred, and that as the defendants had bound themselves to pay as might be paid on the original policy, they were liable to the extent of 1000*l.*; but that they could not be held liable for more, as the underwriters of the Lloyd's policy were not the "factors, servants, or assigns" of the plaintiffs within the meaning of the suing and labouring clause, and that the defendants were not liable, at least by virtue of that clause, for any part of the expenses incurred in floating the ship. Uzielli *v.* Boston Marine Insurance Company - - - **C. A. 11**

INTERPLEADER—Decision of Queen's Bench Division—Appeal to Court of Appeal
See Practice. 8. [**569**

INTERROGATORIES—Handwriting—Libel **439**
See Practice. 9.

JUDGMENT SUMMONS—Committal—County court—Transfer to Bankruptcy Court
See Bankruptcy. 7. [**335**

JUSTICES—Lunatic—Custody—Personal examination - - - - **122**
See Lunatic.

LANDLORD AND TENANT—*Agistment of Cattle for "fair price"—Payment in kind—Protection from Distress*—46 & 47 *Vict. c.* 61, *s.* 45.] Live stock agisted for a fair equivalent is within 46 & 47 Vict. c. 61, s. 45 (the Agricultural Holdings Act, 1883), as taken in to be fed at a "fair price," and may, therefore, be exempt from distress, even although such equivalent be not money.—Cows were agisted on the terms "milk for meat," i.e., that the agister should take their milk in exchange for their pasturage:—*Held*, that the agistment was within the Act. London and Yorkshire Bank *v.* Belton - - **457**

2. —— *Distress—Entry by raising Window partly open.*] Entry into a house for the purpose of distraining may lawfully be made by further opening a window which is partly open. Crabtree *v.* Robinson - - - - **312**

3. —— *Power to determine Tenancy by delivering Notice to Tenant—Tenant not to be found—Delivery of Notice at demised Premises.*] A lease of premises for twenty-one years contained a proviso that it should be lawful for the landlord or his assigns to put an end to the demise at the end of the first fourteen years by delivering to the tenant or his assigns six calendar months previous notice in writing of his intention to do so. In an action by the assignee of the reversion to recover possession of the premises on the ground that the demise had been duly determined by notice under

LANDLORD AND TENANT—*continued.*
the proviso, it appeared that the lessee had disappeared some years previously, after having mortgaged the premises by way of underlease, that his address could not be found, and that written notice to determine the tenancy directed to him had been sent to his last known address, and had also been delivered to the mortgagee and to the occupier of the premises:—*Held*, that the action could not be maintained, as there had been no service of the notice on the lessee, and as he had not assigned the premises no other service would satisfy the terms of the proviso. Hogg *v.* Brooks - - - - - **C. A. 256**

4. —— *Yearly Tenancy—Half-years' Notice—Six Months' Notice, Distinction between—Agricultural Holdings Act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 33.] A tenancy under a written agreement from year to year "until six months notice shall have been given . . . in the usual way to determine the tenancy" is not one "where a half-year's notice . . . is by law necessary" within 46 & 47 Vict. c. 61 (the Agricultural Holdings Act, 1883), s. 33, which, therefore, does not apply so as to render a year's notice necessary for the determination of the tenancy. Barlow *v.* Teal - - **403**

5. —— *Yearly Tenancy—Half-year's Notice and Six Months' Notice, Distinction between—Agricultural Holdings Act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 33.] A tenancy under a written agreement from year to year "until six months' notice shall have been given . . . in the usual way to determine the tenancy," is not one "where a half-year's notice . . . is by law necessary" within the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 33, which, therefore, does not apply so as to render a year's notice necessary for the determination of the tenancy.—Judgment of the Queen's Bench Division (ante, p. 403) affirmed. Barlow *v.* Teal - - - **C. A. 501**

—— Ejectment—Determination of plaintiff's title after action brought—Writ of possession - - - - - **294**
See Ejectment.

—— Lease by mortgagor after mortgage—Right to trade fixtures - - - **218**
See Fixtures.

—— Right of shooting—Overstocking land with game—Injury to crops - - **258**
See Game.

—— Tenancy in common—Ordinary repairs—Contribution - - - **60**
See Tenancy in Common.

—— Valuation on expiration of tenancy—Agreement to appoint valuers—Rule of Court
See Arbitration. 2. [**426**

LANDS CLAUSES ACTS—*Sewer—Right of Access to—Injuriously affecting such Right—Compensation—Lands Clauses Consolidation Act*, 1845, *s.* 68—*Railways Clauses Consolidation Act*, 1845, *s.* 6.] The plaintiffs, in 1843, under the authority of a local Act, constructed a sewer on land part of which had been bought by the defendants, a railway company, but had not then been used for their works. Part of the remainder was bought by the defendants after the construction of the sewer, but no part of the land was the plaintiffs', or had ever been granted to them. The local Act

LANDS CLAUSES ACTS—*continued.*
not only authorized the plaintiffs to make the sewer, but vested it in them, with the duty to repair it, without, however, giving them any express right of access thereto. In 1863 the defendants, in exercise of the powers conferred on them by their special Act, with which was incorporated the Railways Clauses Consolidation Act, 1845, constructed an embankment over the sewer which, though it made it less easy, did not prevent the plaintiffs getting access to the sewer in order to repair it. The plaintiffs being obliged afterwards to repair, and having incurred extra expense in doing so in consequence of the embankment, claimed compensation from the defendants under s. 68 of the Lands Clauses Consolidation Act, 1845, and s. 6 of the Railways Clauses Consolidation Act, 1845, for injuriously affecting the plaintiffs' interest in the sewer:—*Held*, by the Queen's Bench Division, that the plaintiffs had no interest in land within the meaning of the Lands Clauses Consolidation Act, 1845, s. 68, and therefore could not maintain the claim to compensation:—*Held*, by the Court of Appeal, that as a right of access to the sewer had not been expressly given by the local Act but had to be implied, the right of access which ought to be implied was not any particular mode of access, but such only as was reasonably necessary for enabling the repair of the sewer to be done, and as that had not been prevented by the defendants' embankment, but only rendered less easy and convenient, the plaintiffs had no right to compensation. MAYOR OF BIRKENHEAD *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY [C. A. 572

LIBEL—Interrogatories—Handwriting - 439
See PRACTICE. 9.

LIMITATIONS, STATUTE OF—Sale of—Right of entry—Fictitious title—Knowledge of buyer - - - - 491
See ENTRY, RIGHT OF.

—— Married woman—Discoverture - 667
See LUNATIC. 2.

LOCAL GOVERNMENT ACTS—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 117—*Unwholesome Meat—Condemnation by Justice—Proceedings for Penalty—Evidence of State of Meat.*] When unwholesome meat has been condemned by a justice, and proceedings are afterwards taken before a court of summary jurisdiction, under 38 & 39 Vict. c. 55 (Public Health Act, 1875), s. 117, against the owner of the meat, evidence may be given by him as to the state of the meat at the time of condemnation. WAYE *v.* THOMPSON - - - - - - 342

LUNATIC—*Custody of—Lunatic Asylums Act*, 1853 (16 & 17 *Vict. c.* 97), *s.* 68—*Jurisdiction of Justices—Personal Examination by Justices of alleged Lunatic.*] In order to give two justices jurisdiction to make an order under s. 68 of the Lunatic Asylums Act, 1853, for the reception of a person into a lunatic asylum as a lunatic who is not a pauper, and not wandering at large, but who is not under proper care and control, it is not necessary that they should examine such person in the presence of the medical man whom they have called to their assistance, nor that the examination should be made with the knowledge of the alleged lunatic, so that he should have the opportunity of explaining, if he could, what might otherwise be signs of insanity.—Though his examination must not be a sham, yet if it be made by the justices bonâ fide for the purpose of satisfying themselves of the sanity or insanity of the person examined, it is sufficient, and their order is not without jurisdiction because the examination lasted only four or five minutes and was made at the door of the carriage in which the alleged lunatic was seated with his attendants preparatory to his being taken to the asylum:—So *held* by Sir James Hannen, and Lindley, L.J. (Lord Coleridge, C.J., dissenting):—*Held*, by Lord Coleridge, C.J., that where the person deemed to be a lunatic is examined by two justices at his place of abode or elsewhere, the 68th section requires that one of such two justices must already have had, as a condition precedent to the vesting of the jurisdiction of the justices, either an information upon oath, or private or personal knowledge of his own as to the insanity of such person. THE QUEEN *v.* WHITFIELD C. A. 122

2. —— *Custody—Order for Detention—Order for Discharge*—8 & 9 *Vict. c.* 100, *ss.* 72, 99—16 & 17 *Vict. c.* 96, *s.* 4, *sched. A. No.* 1—*Limitations, Statute of* (21 *Jac.* 1, *c.* 16), *ss.* 3, 7—*Married Woman*—"*Discovert*"—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75).] The plaintiff was detained in a private asylum for lunatics, of which the defendant was superintendent, under an order signed by her husband. In the statement annexed to the order the question "Whether first attack," was answered thus: "For the last twenty years has been subject to what is termed hysteria;" and the question, "When and where previously under care and treatment," was answered, "During this period of twenty years has been constantly under treatment":—*Held*, that the order, together with the statement, was sufficient under 16 & 17 Vict. c. 96, s, 4, sched. A (No. 1), and afforded a defence under 8 & 9 Vict. c. 100, s. 99, to an action for an assault and false imprisonment.—The plaintiff's husband, having received a letter from the Commissioners in Lunacy intimating that she ought to be discharged, wrote to the defendant as follows: "After the Commissioners' letter I suppose that I must consent to Mrs. Lowe's discharge, and beg you will carry out their suggestion as soon as you may think it advisable":—*Held*, that the letter of the plaintiff's husband was not an order of discharge within 8 & 9 Vict. c. 100, s. 72.—A married woman can maintain in her own name an action for an assault and false imprisonment committed before the coming into operation of the Married Women's Property Act, 1882, even although the cause of action accrued more than four years before suit, provided the action be brought within four years after the coming into operation of that statute, for she thereby has become "discovert" within the meaning of 21 Jac. 1, c. 16, s. 7. LOWE *v.* FOX - - - C. A. 667

MAIN ROAD—Application to declare ordinary highway—Road disturnpiked - 70
See HIGHWAY. 3.

MAIN ROAD—*continued.*
—— Contribution of county for repair - - 25
See Highway. 2.

MARRIED WOMAN—Separate property—Contract before Married Women's Property Act, 1882 - - - - 234
See Husband and Wife.

METROPOLIS MANAGEMENT ACTS—*New Street—Pavement—Power to make Branch Drains to Sewer—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 78, 250—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 112.] A builder made drains from certain houses in a road to the boundary of the forecourts of the houses. The road was what is known as a builder's road, made and coated with gravel and ballasted. The footpaths were made with gravel and kerbed with granite. The houses on either side of the road were not completed and inhabited, but the road was open for carriages and foot-passengers. It was lighted by the parish but had not been taken to as a public road. The vestry made branches from the drains into a sewer which belonged to them and ran along the centre of the road, and for that purpose they opened the road and footway. The builder declined to repay to the vestry the expenses incurred thereby:—*Held*, (1), that the road was not the less a street within the definitions in s. 250 of the Metropolis Management Act, 1855, and s. 112 of the Metropolis Management Act, 1862, because it came within the definition of a new street in the last-mentioned section;—(2.) That s. 78 of the Metropolis Management Act, 1855, which authorizes the opening of the pavement of any street for the purpose of branching private drains into a sewer, applies equally to streets and to new streets;—(3.) That, looking to the definition of the word "pave" in s. 112 of the Metropolis Management Act, 1862, the road was paved:—That, consequently, the vestry had opened a part of the pavement of a street and were entitled under s. 78 of the Metropolis Management Act, 1855, to recover the expenses incurred by them. Hampstead Vestry *v.* Hoopel - - 652

2. —— 18 & 19 *Vict. c.* 120, *s.* 6—*Vestryman—Qualification of—Rating—Occupation.*] By 18 & 19 Vict. c. 120 (Metropolis Local Management Act, 1855), s. 6, "the vestry elected under this Act in any parish shall consist of persons rated or assessed to the relief of the poor upon a rental of not less than 40*l.* per annum; and no person shall be capable of acting or being elected as one of such vestry for any parish, unless he be the occupier of a house, lands, tenements, or hereditaments in such parish, and be rated or assessed as aforesaid upon such rental as aforesaid within such parish":—*Held*, that to be qualified as a vestryman under the Act a person must be the occupier of real property in the parish and be himself rated or assessed in respect of such occupation to the required amount. Mogg *v.* Clark [82

MILITARY LAW—*Habeas Corpus—Canteen-Steward—Army Act*, 1881, 44 & 45 *Vict. c.* 58, *s.* 176, *sub-s.* 4.] A canteen-steward appointed by the commanding officer of the district, acting under a committee consisting of three officers, and having no interest in the profits of the canteen, but receiving such pay or allowance as the committee may think fit to award him, and being liable to dismissal at the pleasure of the committee, though performing no military duty, wearing no uniform, bearing no arms, and having free ingress and egress at his pleasure to and from the barracks,—is still a person subject to military law within s. 176, sub-s. 4, of the Army Act, 1881. *In re* Flint - - - 488

MORTGAGE—Fixtures—Driving belts—Bills of Sale Act, 1854 - - - 358
See Fixtures. 2.
—— Lease by mortgagor after mortgage—Right to trade fixtures - - - 218
See Fixtures.

MUNICIPAL CORPORATION—*Election of Councillors—Nomination Paper—Signature of assenting Burgess—Defect in Entry on Burgess Roll—Variance—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 241.] A nomination paper at an election of town councillors was subscribed with the full and correct name of "Charles Arthur Burman" as an assenting burgess; but his name was erroneously entered upon the burgess roll as "Charles Burman" only:—*Held*, that the defect was not such as was remedied by 45 & 46 Vict. c. 50, s. 241, enacting that "no misnomer or inaccurate description of any person . . . . named in any roll . . . . required by this Act shall hinder the full operation of this Act with respect to that person . . . . provided the description of that person . . . . be such as to be commonly understood."—The words "commonly understood" in this proviso mean "commonly understood by any person comparing the nomination paper and the burgess roll." Moorhouse *v.* Linney. Thorpe *v.* Linney - - 273

NEGLIGENCE—*Breach of Duty—Articles sold consigned in Defective Truck to Vendee—Injury to Servant of Vendee.*] The defendant, a colliery owner, consigned coals sold by him to the buyers by rail in a truck rented by him from a waggon company for the purposes of the colliery. Through the negligence of the defendant's servants the truck was allowed to leave the colliery in a defective state. In consequence of the defect in the truck injury was occasioned to the plaintiff, one of the buyers' servants, who was employed in unloading the coals, and had got into the truck for that purpose:—*Held*, that there was a duty on the part of the defendant towards the plaintiff to exercise reasonable care with regard to the condition of the truck, and the defendant was therefore liable to the plaintiff in respect of the injuries sustained by him. Elliott *v.* Hall - 315

NOTARY—Notarial certificate—Affidavit sworn abroad - - - - 332
See Bankruptcy. 7.

NOTICE—Judgment summons for committal—Transfer to Bankruptcy Court—Receiving order—Notice to judgment debtor
See Bankruptcy. 7. [335
—— Power to determine tenancy—Delivery to tenant—Absence of tenant - 256
See Landlord and Tenant. 3.

NOTICE TO QUIT — Half-year's notice — Six month's notice - - - - **403**
See LANDLORD AND TENANT. 4.

ORDER AND DISPOSITION—Bankruptcy—Certificates of shares - - - **441**
See BANKRUPTCY. 17.

PARLIAMENT—*Notice of Objection—Description of List, where more than One—Parliamentary and Municipal Registration Act*, 1878 (41 *&* 42 *Vict. c.* 26), *s.* 28, *sub-s.* 2, *and Sched. Form I.* 1, 2.] A notice of objection given to overseers was as follows: "I hereby give you notice that I object to the name of W. B. being retained in the Blockhouse list of persons, Division 1, entitled to vote at the election of members to serve in parliament for the parliamentary borough of W." There were three lists of parliamentary voters for the Blockhouse, viz. 1,—householders and occupiers. 2. freemen,—3. lodgers. The first of these only had divisions. The name of W. B. was on the parliamentary list 1, Division 1, for the Blockhouse:—*Quære*, whether this notice was a sufficient compliance with Form I. No. 1, in the schedule to the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26)?—*Held*, that, if not, the inaccurate description of the list was a "mistake" which the revising barrister had power to correct, under s. 28, sub-s. 2, of the Act. BOLLEN *v.* SOUTHALL - - **461**

POOR LAW—*Removal—Derivative Settlement—Paupers above Sixteen—39 & 40 Vict. c.* 61 (*Divided Parishes Act*, 1876), *s.* 35.] Since 39 & 40 Vict. c. 61 (Divided Parishes Act, 1876) s. 35 enacting that "no person shall be deemed to have derived a settlement from any other person, . . . except . . . in the case of a child under the age of sixteen, which child shall take the settlement of its father . . . up to that age and shall retain the settlement so taken until it shall acquire another," paupers who are above the age of sixteen at the time of the inquiry as to their settlement cannot take the settlement of their father. GUARDIANS OF EDMONTON UNION *v.* GUARDIANS OF ST. MARY, ISLINGTON - - - **95**

2. —— *Removal—Derivative Settlement—Paupers above Sixteen—39 & 40 Vict. c.* 61 (*Divided Parishes Act*, 1876), *s.* 35.] GUARDIANS OF EDMONTON UNION *v.* GUARDIANS OF ST. MARY, ISLINGTON - - - - **C. A. 339**

—— Settlement by residence — Constructive residence of children — Appeal — Case stated under 12 & 13 Vict. c. 45, s. 11
See PRACTICE. [76

POOR-RATE—*Appeal — Assessment Committee—Failure to obtain Relief on Objection to Valuation List—Appeal against second Rate—27 & 28 Vict. c.* 39, *s.* 1.] A person who has once given to the assessment committee notice of objection against a valuation list and failed to obtain such relief as he deems just, may appeal to quarter sessions against any subsequent poor-rate made in conformity with the list, and 27 & 28 Vict. c. 39, s. 1, does not make it a condition precedent of such appeal that previously thereto he should repeat his application to the committee for relief. THE QUEEN *v.* JUSTICES OF DENBIGHSHIRE - **451**

POOR-RATE—*continued.*

2. —— *Rateable Value—Occupation under Statutory Restrictions—Railway Company—Running Powers—Rent fixed by Special Act—Private Act—Construction.*] A private Act of Parliament will be construed more strictly than a public one as regards provisions made by it for the benefit of the persons who obtained it, but, when once the true construction is ascertained, the effect of a private Act is the same as that of a public Act. —The special Act which authorized the making of a railway by the C. company, provided that the L. company should have the right to run their traffic over a part of the line, on payment of a fixed annual rent to the C. company. The rent was much less than the actual value of the traffic passed over that part of the line by the L. Co.:—*Held*, that the C. Company could not be rated for poor-rate in respect of that traffic at a higher sum than the fixed rent. ALTRINCHAM UNION *v.* CHESHIRE LINES COMMITTEE - **C. A. 597**

3. —— *Salary derived from Poor-rate—Disqualification of Guardian—5 & 6 Vict. c.* 57, *s.* 14 *—Clerk of Highway Board — Clerk of School Board—Payment out of Funds raised in a Poor-rate—27 & 28 Vict. c.* 101, *s.* 32—33 *&* 34 *Vict. c.* 75.] The Act 5 & 6 Vict. c. 57, s. 14, which enacts that "no person receiving any fixed salary . . . from the poor-rates in any parish or union, shall be capable of serving as a guardian in such parish or union," does not apply to the clerk of a highway board or of a school board whose salary is paid out of the highway or school board fund, which is a fund supplied from moneys contributed by parishes in pursuance of precepts issued under the Highway Act, 1864 (27 & 28 Vict. c. 101), or the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), respectively.—Judgment of the Queen's Bench Division (14 Q. B. D. 325) affirmed. THE QUEEN *v.* RAWLINGS. THE QUEEN *v.* DIBBIN - - - **C. A. 382**

4. —— *Bristol Waterworks Acts*, 1862 *and* 1865 — "*Water-rate*" — "*Annual Rack-rent or Value*"—"*Gross Sum assessed to the Poor-rate*"—*Pleasure Garden attached to and occupied with a Dwelling-house—Extra Charge for "a pipe and tap or other apparatus" used in the garden.*] Sect. 68 of the Bristol Waterworks Act, 1862, enacts that the company shall furnish to every occupier of a private dwelling-house within their limits a sufficient supply of water for the domestic use of such occupier, at certain annual rents or rates according to the "annual rack-rent or value of the premises so supplied,"—such supply (by s. 71) not to include, amongst other things, a supply of water "for watering gardens by means of a tap, tube, pipe, or other such like apparatus," And s. 32 of the Bristol Waterworks Amendment Act, 1865, enacts that, "if any dispute shall arise as to the amount of the annual rent or value of any dwelling-house or premises supplied with water by the company, such dispute shall be decided by two justices: provided that the amount of the annual rack-rent or value to be fixed by such justices shall not be less than the gross sum assessed to the poor-rate, or less than the rent actually paid for such dwelling-house or premises." A dwelling-house and garden in the occupation of the owner were assessed to the poor-rate as

POOR-RATE—*continued.*

follows,—"Gross estimated rental, 240*l.*" "Rateable value, 204*l.*" It was proved that the value of the house without the garden would be 10 per cent. less; and that the owner contracted to pay and did pay 1*l.* 1*s.* annually for the watering by means of a pipe and tap in the garden which surrounded the dwelling-house and was occupied and assessed therewith:—*Held*, upon a case stated by the justices, that the words "gross sum assessed to the poor-rate," meant the "gross estimated rental," and not "rateable or net value;" and that the water-rent was chargeable upon the gross estimated rental of "the premises," including the pleasure garden occupied with the house, and not merely upon the dwelling-house itself,—the extra charge for the garden supply being for using a pipe and tap. Bristol Waterworks Company *v.* Uren - - - - - **637**

PRACTICE—*Appeal—Case stated under* 12 *&* 13 *Vict. c.* 45, *s.* 11—*Poor Law—Supreme Court of Judicature Act*, 1873, *ss.* 19, 45—*Settlement by Residence—Constructive Residence of Children—Evidence.*] An appeal lies to the Court of Appeal from the decision of the Divisional Court upon a case stated under 12 & 13 Vict. c. 45, s. 11, on an appeal from an order of the justices to the quarter sessions, it not being a decision of the Divisional Court on an appeal from petty or quarter session within the meaning of s. 45 of the Judicature Act, 1873, and it being an "order" within s. 19 of that Act.—Upon appeal to the quarter sessions from an order of the justices adjudging that two pauper children under sixteen years of age were settled in a parish within the Holborn Union, in which their father had a settlement at the time of his death, it appeared that seven years before the order the children, then under seven years old, were on the death of their mother placed by their father in the care of K. and his wife, who resided at Chertsey within the Chertsey Union, and lived with them from that time continuously until they became chargeable. After they went to Chertsey the children were visited by their father on three occasions only, and then only for a few hours at a time, but he made a weekly payment for their maintenance which was continued to his death:—*Held*, reversing the decision of the Divisional Court that there was evidence on which the justice might find, as they must be taken to have done, that the father had never given up the intention that his children should return to him when he was in a position to receive them, and that therefore there was no ground for quashing the order of the justices. Guardians of Holborn *v.* Guardians of Chertsey - - - **C. A. 76**

2. —— *Security for Costs—Counter-claim—Defendant out of Jurisdiction.*] Where a claim and counter-claim arise out of different matters, so that the counter-claim is really in the nature of a cross action, the defendant, if he is residing out of the jurisdiction, may be required to give security for the plaintiff's costs of the counter-claim, and, if the only dispute remaining arises on the counter-claim, it is beyond doubt right that he should be so required. Sykes *v.* Sacerdoti [**C. A. 423**

PRACTICE—*continued.*

3. —— *Costs, Taxation of—Solicitor and Client—Costs of Third Counsel.*] The costs of a third counsel that have been disallowed as between party and party come within the principle laid down in the case of *In re Blyth and Fanshawe* (10 Q. B. D. 207), and therefore will not be allowed on taxation as between solicitor and client, unless the solicitor has warned the client that such costs might not be allowed as between party and party. *In re* Broad and Broad **C. A. 252**

4. —— *Costs—Order on Solicitor personally to pay Costs—Appeal—Judicature Act*, 1873, *s.* 49.] An order that the costs of an application at Chambers on behalf of a client shall be paid by the solicitor personally cannot be costs left to the discretion of the Court within s. 49 of the Judicature Act, 1873, unless the solicitor has been guilty of misconduct or negligence, and, therefore, an appeal lies from such order without leave as to whether there has been such misconduct or negligence.—Decision of the Queen's Bench Division (11 Q. B. D. 373) reversed. *In re* Bradford [**C. A. 635**

5. —— *Discovery of Documents—Privilege—Documents privileged in Previous Action by Plaintiff against a Third Party—Order XXXI., rr.* 12–14.] An order having been made for discovery of documents by the plaintiff in an action, the plaintiff stated on affidavit that, among other documents relating to the matters in question in the action, he had in his possession certain documents partially prepared by his solicitors in an action previously brought by him against one D. (a person other than the defendant) for future use in carrying on the said action, but which were, in fact, never completed or used owing to such action not proceeding in consequence of D.'s death, and that the whole of the said documents were of a private and confidential nature between counsel, solicitor, and client:—*Held*, that the documents were privileged from discovery in the action.—*Bullock* v. *Corry* (3 Q. B. D. 356) followed. Pearce *v.* Foster - - - **C. A. 114**

6. —— *Production of Documents—Documents held in Right of another, Production of, when ordered.*] In an action on a promissory note, made by the defendant as security for the repayment of moneys due to the plaintiff from a limited company, the defendant objected to produce documents relating to the matters in question in the action, being the banker's pass-book and directors' minute-book of the company, on the ground that they were in his custody only as liquidator in the voluntary winding-up of the company. The company had been dissolved before the application for discovery of documents was made:—*Held*, that the plaintiff was entitled to inspection of the documents, as there was no interest which could be affected by their production other than the interest of the parties to the action.—*Murray* v. *Walter* (Cr. & P. 114), *Kearsley* v. *Phillips* (10 Q. B. D. 465), and *Vivian* v. *Little* (11 Q. B. D. 370) distinguished. London and Yorkshire Bank *v.* Cooper - - - - **7**

7. —— *Production of Documents—Documents held in Right of Another, Production of, when ordered—Company—Voluntary Winding-up—Liquidator—Companies Act*, 1862 (25 *&* 26 *Vict.*

PRACTICE—*continued.*

c. 89), *s.* 155.] In an action on a promissory note, made by the defendant as security for the repayment of moneys due to the plaintiffs from a limited company, the defendant objected to produce documents relating to the matters in question in the action, being the banker's pass-book and directors' minute-book of the company, on the ground that they were in his custody only as liquidator in the voluntary winding-up of the company. The company had been dissolved before the application for the discovery of documents was made, but no resolution had been passed under the Companies Act, 1862, s. 155, for the disposal of the documents belonging to it: —*Held*, that the plaintiffs were entitled to the inspection of the documents, inasmuch as the defendant had them in his absolute control.—Decision of the Queen's Bench Division (ante, p. 7) affirmed. LONDON AND YORKSHIRE BANK *v.* COOPER - - - - - C. A. 473

8. —— *Interpleader—Appeal—Summary Decision at Chambers—Appeal from Queen's Bench Division to Court of Appeal—Common Law Procedure Act*, 1860 (23 & 24 *Vict. c.* 126), *s.* 17—*Appellate Jurisdiction Act*, 1876 (39 & 40 *Vict. c.* 59), *s.* 20—*Rules of the Supreme Court*, 1883, *Order LVII., rr.* 8, 11.] By the combined operation of the Common Law Procedure Act, 1860, s. 17, and of the Appellate Jurisdiction Act, 1876, s. 20, no appeal lies to the Court of Appeal from a decision of the Queen's Bench Division upon an appeal from the summary decision at chambers of an interpleader summons, and r. 11 of the Rules of the Supreme Court, 1883, Order LVII., does not confer any power to give leave to appeal. WATERHOUSE *v.* GILBERT - - C. A. 569

9. —— *Interrogatories — Libel — Matters in Issue—Order XXXI., r.* 1—*Comparison of Handwriting.*] In order to prove that the defendant was the writer of a libellous letter, he may be interrogated as to whether or not he was the writer of another letter addressed to a third person,—as leading up to a matter in issue in the cause, and therefore relevant. JONES *v.* RICHARDS [439

10. —— *Jurisdiction—Foreigner out of the Jurisdiction—Service of Notice of Appointment of Receiver.*] The plaintiff having obtained judgment against the defendant, a foreigner resident out of the jurisdiction, a summons was issued by leave of a judge at chambers calling on the defendant to shew cause why a receiver should not be appointed. On an application for leave to serve this summons on the defendant out of the jurisdiction:—*Held*, that there was no jurisdiction to grant such leave. WELDON *v.* GOUNOD 622

11. —— *Solicitor and Client—Costs—Taxation—Costs of Third Counsel on Appeal.*] The rule laid down in *In re Blyth and Fanshawe* (10 Q. B. D. 207) applies to the costs of employing a third counsel on the hearing of an appeal, the expense being an unusual one.—Therefore, even if a solicitor has obtained his client's sanction to the employment of a third counsel on an appeal, the costs will not be allowed on taxation between solicitor and client, unless the solicitor has also explained to the client that the costs will probably not be allowed as between party and party, and that, even if he succeeds on his appeal, he may have to pay the costs of the third counsel himself.—Decision of Divisional Court affirmed. IN RE BROAD AND BROAD - - - C. A. 420

12. —— *Writ for Service out of Jurisdiction —Injunction — Jurisdiction of Court — Libel — Rules of Supreme Court*, 1883, *Order XI., r.* 1 (*f*).] A writ of summons claiming an injunction to restrain the defendant (resident out of the jurisdiction) from sending libels to the plaintiff (residing within the jurisdiction) and publishing the same within the jurisdiction, and claiming also damages, may, by leave of the Court, be issued and served upon the defendant, at least if it does not appear that the defendant never comes within the jurisdiction.—Judgment of the Queen's Bench Division (p. 650) affirmed. TOZIER *v.* HAWKINS [C. A. 680

—— Bankruptcy—Affidavit sworn abroad—Notarial certificate—British vice-consul *See* BANKRUPTCY. 14. [332

—— Bankruptcy — Solicitor — Examination of debtor—Right of audience - 54 *See* BANKRUPTCY. 18.

—— Costs—Bankruptcy - - - 340 *See* BANKRUPTCY. 6.

—— Ejectment—Writ of possession—Expiration of plaintiff's title - - - 294 *See* EJECTMENT.

—— Habeas corpus—Party to motion - 471 *See* HABEAS CORPUS.

—— Landlord and tenant—Agreement to appoint valuers—Rule of Court - - 426 *See* ARBITRATION. 2.

—— Solicitor—Unqualified practitioner—Attachment—Contempt - - - 348 *See* SOLICITOR. 2.

PRESCRIPTION—Right of way—Forty years' enjoyment—Remainderman—Reversion expectant on term of life or years 629 *See* EASEMENT.

PRESENTATION, RIGHT OF — Consolidated benefice—Quare impedit - - 432 *See* ECCLESIASTICAL LAW. 2.

PRINCIPAL AND AGENT—*Agent betting for Principal—Action for the Money received—Wagering*—8 & 9 *Vict. c.* 109, *s.* 18.] The plaintiff employed the defendant for a commission to make bets for him on horses. The defendant accordingly made such bets, and he received the winnings from the persons with whom he had so betted. In an action by the plaintiff for the amount which the defendant had so received:—*Held*, that 8 & 9 Vict. c. 109, s. 18, which makes null and void all contracts by way of wagering, did not apply to the contract between the plaintiff and defendant, and that, therefore, notwithstanding that statute, the plaintiff was entitled to recover in respect of the bets which had been so paid to the defendant.—*Beyer* v. *Adams* (26 L. J. (Ch.) 841) overruled. BRIDGER *v.* SAVAGE - - C. A. 363

2. —— *Stock Exchange, Usage of — Bank Shares, Contract for Sale of—Omission to specify Numbers of Shares*—30 & 31 *Vict. c.* 29, *s.* 1—*Broker's Right to Indemnity.*] The defendant instructed the plaintiffs, stockbrokers of Bristol,

PRINCIPAL AND AGENT—*continued.*
to purchase for him shares in a joint stock banking company on the London Stock Exchange. The plaintiffs gave directions accordingly to their London agents, brokers on the London Stock Exchange, who purchased the shares from jobbers on the Stock Exchange in the usual way, without having in the contract distinguishing numbers of the shares, it not being the practice on the London Stock Exchange to specify the numbers or otherwise to comply with 30 & 31 Vict. c. 29 (Leeman's Act), s. 1. By the Rules of such Stock Exchange it is provided that the Stock Exchange shall not recognise in its dealings any other persons than its own members, such members, if they do not carry out contracts, being liable to be expelled from the Stock Exchange, and that no application to annul a contract shall be entertained by the committee of the Stock Exchange unless upon a specific allegation of fraud, or wilful misrepresentation. Before the settling day the defendant repudiated the contract, but the committee of the Stock Exchange refused to annul the contract, and therefore the plaintiffs completed it, and paid the price of the shares. The defendant was ignorant of the usage of the London Stock Exchange with regard to dealings in shares of banking companies, and did not know that the purchasing broker was by such usage bound to perform a contract for the purchase of banking shares, though void at law under Leeman's Act:—*Held*, affirming the decision of Grove, J., that the plaintiffs were not entitled to recover from the defendant the money paid by them as the price of the shares, since the usage of the Stock Exchange to disregard Leeman's Act, and to recognise as valid a contract which was made contrary to that Act, was unreasonable as against strangers who did not know it, and therefore was not binding on the defendant. PERRY *v.* BARNETT C. A. 388

—— Commission agent—Goods bought for foreign principal—Stoppage in transitu - 39
See BANKRUPTCY. 19.

PROOF — Bankruptcy — "Debt or liability"—Order of Divorce Court for alimony 239
See BANKRUPTCY. 15.

QUARE IMPEDIT—Consolidated benefice—Right of presentation - - - 432
See ECCLESIASTICAL LAW. 2.

RAILWAY COMMISSIONERS — *Special Case—Power to state*—36 & 37 *Vict. c.* 48, *ss.* 15, 26—*Terminal Charges—Stations, Sidings, &c.—Services incidental to the Business of a Carrier*—26 & 27 *Vict. c. ccxviii., s.* 51.] On the hearing of an application made under the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 15, the Railway Commissioners have power to state a special case for the opinion of the High Court.—By the London, Brighton, and South Coast Railway Act, 1863 (26 & 27 Vict. c. ccxviii.), s. 51: "The maximum rates of charges to be made by the company for the conveyance of animals and goods, including the tolls for the use of their railways and waggons or trucks and for locomotive power, and every other expense incidental to such conveyance (except a reasonable sum for loading, covering, and unloading the goods at

RAILWAY COMMISSIONERS—*continued.*
any terminal station of such goods, and for delivery and collection, and any other services incidental to the duty or business of a carrier, where such services or any of them are or is performed by the company), shall not exceed" certain sums prescribed:—*Held*, that station accommodation, the use of sidings, weighing, checking, clerkage, watching, and labelling, provided and performed by the company in respect of goods traffic carried by them as carriers, may be, and primâ facie are "services incidental to the duty or business of a carrier" within s. 51; whether they are so in any particular case is a question of fact for the Railway Commissioners to decide, and, if found by them to be so, such services may be the subject of a separate reasonable charge in addition to the rates prescribed. HALL & Co. *v.* LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY - - - - - - 505

RAILWAY — Running powers — Fixed rent—Rateability - - - - 597
See POOR-RATE. 2.

RECEIVER, OFFICIAL—Power to sell bankrupt's property - - - - 196
See BANKRUPTCY. 16.

—— Report as to composition or scheme of arrangement — How far primâ facie evidence - - - - 213
See BANKRUPTCY. 5.

REFERENCE—Order of reference — Death of party before making of award - 565
See ARBITRATION.

REGISTRAR—Bankruptcy—Approval of composition or scheme of arrangement—Discretion - - - - 213
See BANKRUPTCY. 5.

RE-INSURANCE — Constructive total loss — Notice of abandonment - - 11
See INSURANCE (MARINE). 2.

REMAINDERMAN — Easement—Prescription—Forty years' enjoyment—Reversion expectant on term of life or years - 629
See EASEMENT.

REPUTED OWNERSHIP—Certificates of shares—Bankruptcy - - - - 441
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RES JUDICATA—Second action for same cause of action - - - - 549
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ROLLER—Steam roller—Repair of highway—Injury to gas pipes - - 1
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RULES OF SUPREME COURT, 1883, Order XI., r. 1 (f) - - - - 680
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—— **Order XXXI., r. 1** - - - 439
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—— —— **rr. 12–14** - - - - 114
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—— **Order LVII., rr. 8, 11** - - 569
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—— —— **Order LXX. r. 2** - - - 680
See PRACTICE. 12.

SALE OF GOODS—Breach of contract—Measure of damages—Contract by vendee - 85
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—— Frauds, Statute of, s. 17 — Acceptance—Act recognising the contract - 228
See Frauds, Statute of.

SCHOOL BOARD — Clerk — Disqualification as guardian of parish or union - 382
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SECURITY FOR COSTS—Counter-claim—Defendant out of jurisdiction - - 423
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SEQUESTRATION—Repairs done by sequestrator—Objection to accounts—Dilapidations to glebe buildings - - - 222
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See Bankruptcy. 20.

—— Poor law—Evidence - - - 339
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SEWER—Power to make branch drains—Metropolis Management Acts - - 652
See Metropolis Management Acts.

—— Right of access to—Obstruction—Compensation - - - - - 572
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SHERIFF—Sale under execution — Notice of bankruptcy petition - - 48
See Bankruptcy. 9.

SHIP—*Charterparty—Bill of Lading—Freight—Incorporation of Conditions of Charterparty in Bill of Lading—Lien.*] A charterparty contained a stipulation in the usual form for payment of freight at the rate of 1*l.* 11*s.* 3*d.* per ton; it also contained a clause that the shipowner should have "an absolute lien on the cargo for freight, dead freight, demurrage, lighterage at port of discharge, and average;" and a further clause that the captain was to sign bills of lading at any rate of freight; "but should the total freight as per bills of lading be under the amount estimated to be earned by this charter, the captain to demand payment of any difference in advance." Certain goods were put on board the chartered ship, and were made deliverable to the plaintiffs (who were not the charterers) by a bill of lading, whereby freight was made payable at 22*s.* 6*d.* per ton: the bill of lading contained also a clause, whereby it was provided that extra expenses should be borne by the receivers and "other conditions as per charterparty." Upon the arrival of the ship at the port of discharge the defendant, who was the shipowner, claimed and compelled payment of freight at the rate mentioned in the charterparty. The plaintiffs having sued to recover back the difference between the freight as specified in the

SHIP—*continued.*
charterparty and the freight as specified in the bill of lading:—*Held*, that the bill of lading did not incorporate the stipulation in the charterparty as to the payment of freight, that no right of lien existed for the freight mentioned in the charterparty, and that the plaintiffs were entitled to delivery of the goods upon payment of the freight specified in the bill of lading. Gardner *v.* Trechmann - - - - C. A. 154

2. —— *Charterparty, Construction of—Ready Quay Berth as ordered by Charterer—Demurrage.*] By a charterparty it was agreed that the plaintiff's vessel after loading a certain cargo should proceed "to London or Tyne dock to such ready quay berth as ordered by the charterers," "demurrage to be at the rate of 30*l.* per running day," in no case unless in berth before noon were the lay days to count before the day following that on which the vessel was in berth, and the captain or owners were to have an absolute lien on the cargo for all freight and demurrage in respect thereof.—The vessel was ordered by the charterers to a certain London dock, but when the vessel arrived at such dock there was no quay berth ready for her, and she was consequently detained one day beyond the time required for discharging her had she been able to have got alongside a quay berth on her arrival in the dock:—*Held*, on the construction of this charterparty, that the charterers were bound to name such a quay berth as was ready, and that for the detention caused by the charterers neglecting to do so the plaintiffs were entitled to a lien on the cargo for demurrage, the damage for the detention being sufficiently in the nature of demurrage to come within the demurrage clause. Harris *v.* Jacobs - C. A. 247

3. —— *Freight — Charterparty — "Port"—Final sailing of Ship from last Port.*] The word "port" in a charterparty is to be understood in its popular, or business, or commercial sense; it does not in such a document necessarily mean the port as defined for revenue or pilotage purposes.—Tests for determining the business meaning of the word "port" considered.—A charterparty provided that a ship should load a cargo of coals at Cardiff, and then proceed to Bombay, the freight to be paid two-thirds in cash "ten days after the final sailing of the vessel from her last port in Great Britain," and the remainder in cash on delivery of the cargo. The ship loaded the coals in the Bute Docks, at Cardiff, and, having cleared at the Custom House, started on her voyage to Bombay. She proceeded down the artificial channel leading from the docks to the River Taff, and, when about 300 yards beyond the junction of the channel with the river, she came into collision with a steamer, and was so much injured that she was compelled to return the next day to the docks for repairs:—*Held*, that at the time of the collision the ship was not outside the limits of the port, in the popular, business, or commercial sense of the word; that, consequently, she had not finally sailed from her last port; and that no freight was payable. Sailing-ship "Garston" Co. *v.* Hickie - - - - C. A. 580

SHOOTING, RIGHT OF—Overstocking land with game—Injury to crops - - 258
See Game.

SOLICITOR—*Certificate*—40 & 41 *Vict. c.* 25, *s.* 23, *and Sched. II.*] Where a solicitor has neglected for a whole year to renew his certificate, the Master of the Rolls only has power to order the registrar of certificates (the Incorporated Law Society) to grant him a certificate for the current year.—The right of a solicitor who has neglected to renew his certificate to apply for a fresh one is not a "right acquired or accrued" within 40 & 41 Vict. c. 25, s. 23, Proviso (B.) IN RE CHAFFERS [467

2. —— *Unqualified Practitioner—Acting as a Solicitor—Attachment for Contempt*—6 & 7 *Vict. c.* 73, *s* 2—23 & 24 *Vict. c.* 127, *s.* 26.] Every person who acts as a solicitor contrary to s. 2 of 6 & 7 Vict. c. 73, is liable to attachment for contempt of Court under 23 & 24 Vict. c. 127, s. 26, whether he so acts in the name of any other person or in his own name, unless such person be duly qualified. — Although the Court will generally adopt the findings of the master as to such conduct, his report is not conclusive. IN RE SIMMONS - - - - - 348

—— Money paid by debtor to his solicitor to oppose petition—Adjudication—Title of trustee - - - - 616
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—— Right of audience—Bankruptcy - 54
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STATUTE—Construction—Public and private Act of Parliament - - - 597
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2 & 3 Wm. 4, c. 71, s. 8 - - - 629
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VENDOR AND PURCHASER—*Contract—Restrictive Covenants, non-disclosure of—Right to rescind—Conditions of Sale precluding Objections as to Omissions in Contract, Effect of—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-ss.* 3, 11.] The owner in fee of land sold and conveyed it, during the years 1865, 1866, and 1867, in thirteen lots to different purchasers, each lot being subject to covenants entered into by the purchasers restricting the use of the land as a brickyard and in other respects. The defendant subsequently became the purchaser of Lot 11, but the deed of conveyance to him did not contain the restrictive covenants. In 1882, the plaintiffs, a company for manufacturing bricks, contracted to purchase Lot 11 from the defendant under conditions of sale which stated that the property was sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not; and provided that any error or omission in the particulars should not annul the sale, nor entitle the purchaser to compensation. The existence of the restrictive covenants was not mentioned in the contract, but during the negotiations the defendant stated that there were covenants restricting the use of the land as a brickyard, but his solicitor, who was present, and to whom the plaintiffs' solicitor applied for information, stated that he was not aware of any such covenants. The plaintiffs paid a deposit upon the purchase-money, and having subsequently discovered that there were restrictive covenants, claimed to rescind their contract and sued the defendant to recover the amount of the deposit:—*Held*, that the plaintiffs, if their contract with the defendant were carried out, would be bound by the restrictive covenants, and that the owners of the other twelve lots purchased from the original vendor would be entitled to enforce those covenants against the plaintiffs: that the plaintiffs were not precluded by the terms of the conditions of sale, nor by s. 3, sub-s. 3, of the Conveyancing Act, 1881, from refusing to complete the purchase, and that they were therefore entitled to recover the amount of the deposit. NOTTINGHAM PATENT BRICK AND TILE COMPANY *v.* BUTLER - - - - - - 261

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WILL, CONSTRUCTION OF—*continued.*
writing, should, according to the amount thereof, be taken in full or in part satisfaction of his or her share in the testator's property, unless the testator should otherwise declare by writing under his hand. The sum advanced to the defendant was charged against him in the testator's memorandum book, and such book contained an entry as follows: "This is the memorandum book named in my will as containing the advances made by me to my children or their husbands to be taken in satisfaction of their respective shares in my estate":—*Held*, by Brett, M.R., and Lindley, L.J., Cotton, L.J., dissenting, that the testator's widow was entitled to receive from the defendant during her life, as part of the annual income given to her by the will, interest on the said sum of 2000*l.*—Judgment of the Queen's Bench Division (13 Q. B. D. 246) affirmed. LIMPUS *v.* ARNOLD - - - C. A. 300

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